

Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War

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The Bush Administration has asserted that the President has broad and exclusive power to conduct its war on terror under the Constitution as Commander in Chief. In doing so the Administration ignores or greatly minimizes Congress's constitutional powers to "declare war," "grant Letters of Marque and Reprisal," "make Rules concerning Captures on Land and Water," "raise and support Armies," "provide and maintain a Navy," "make Rules for Government and Regulation of the land and naval Forces," and other express powers such as the Necessary and Proper Clause.¹

The Bush Administration argues that the Commander in Chief has exclusive power to decide what military tactics to use to defeat a wartime enemy, and construes the term "tactics" very broadly. Several examples illustrate the broad Presidential powers claimed by the Administration:

- Administration officials have contended that "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."²

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¹ U.S. CONST. art. I, § 8, cls. 11–14, 18.

² Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, at 35 (Aug. 1, 2002), *available at* <http://www.texscience.org/reform/torture/bybee-olc-torture-1aug02.pdf>. The Justice Department subsequently withdrew that claim as "unnecessary" but never repudiated it. Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Att'y Gen., Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, at 1 (Dec. 30, 2004), *available at* <http://www.usdoj.gov/olc/18usc23402340a2.htm>, and a 2005 presidential signing statement stated that the Executive branch would interpret the McCain Amendment's prohibition on cruel and inhumane interrogations of detainees "in a manner consistent with the President's constitutional authority . . . as Commander in

- The Administration has also claimed that Congress lacks constitutional authority to prohibit the government's warrantless wiretapping program because it is an important intelligence gathering tactic in the government's war against terrorism.³

- In perhaps the clearest and most sweeping statement of the President's authority, the Department of Defense's Working Group Report on Detainee Interrogation in 2003 states "in wartime, it is for the President *alone* to decide what methods to use to best prevail against the enemy."⁴

- President Bush has even asserted that Congress does not have the power to limit or wind down the Iraq war, stating, "I don't think Congress ought to be running the war."⁵

- President Bush vetoed the 2007 Iraq supplemental appropriations bill, which would have required that the President begin withdrawing troops by July 1 under certain circumstances, asserting that "[t]his legislation is unconstitutional because it purports to direct the conduct of the operations of the war in a way that infringes upon the powers vested in the Presidency by the Constitution, including as Commander in Chief of the Armed Forces."⁶

Many have criticized the Bush Administration's invocation of expansive Presidential war powers to interrogate prisoners,⁷ engage in warrantless

Chief." President's Statement on H.R. 2863, Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005). As a senior Administration official later explained, the signing statement was intended to reserve the President's constitutional right to use harsh interrogation methods "in special situations involving national security" despite the congressional ban. Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006, at A1.

³ U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 3 (Jan. 19, 2006), *reprinted in* 81 IND. L.J. 1374, 1376 (2006), *also available at* <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> [hereinafter LEGAL AUTHORITIES].

⁴ U.S. DEP'T OF DEFENSE, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY AND OPERATIONAL CONSIDERATIONS 24 (2003) (emphasis added), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>.

⁵ Adam Cohen, *Just What the Founders Feared: An Imperial President Goes to War*, N.Y. TIMES, July 23, 2007, at A22.

⁶ H.R. Doc. No. 110-31 (Veto Message from the President) at 153 CONG. REC. H4315. Stuart Taylor, Jr., *The President's War Powers*, NEWSWEEK, May 7, 2007, *available at* <http://www.newsweek.com/id/34860>.

⁷ See DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 62-63 (2007); Fletcher N. Baldwin, Jr., & Robert B. Shaw, *Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law*, 17 J. LAW & PUB. POL'Y 429, 466-68 (2006); Erwin Chemerinsky, *The Assault on the Constitution*, 40 U.C. DAVIS L. REV. 1,

wiretapping of American citizens, or conduct the Iraq war.⁸ However, few of those critics have challenged the Administration's initial premise—that the Constitution gives the President as Commander-in-Chief unbridled power over battlefield tactical decisions in the conduct of war.

This Article, however, challenges that assumption and will demonstrate that it is not supported by the Constitution, history, or logic. Congress and the President have concurrent power to conduct warfare that has been authorized by Congress. Congress maintains the ultimate authority to decide the methods by which the United States will wage war. The President can direct and manage warfare, however, the only Commander in Chief power that Congress cannot override is the President's power to command: to be, in Alexander Hamilton's words, the nation's "first General and Admiral."⁹

The Administration's position that it has exclusive power over tactical or battlefield operations finds some support in legal scholarship and Supreme Court dicta. In his 1866 concurring opinion in *Ex parte Milligan*, Chief Justice Salmon P. Chase observed that Congress could not enact legislation that "interferes with the command of the forces or the conduct of campaigns. That power and duty belongs to the President as commander-in-chief."¹⁰ Chase's dictum that Congress "cannot direct the conduct of campaigns" was repeated by the Supreme Court two years ago in *Hamdan v. Rumsfeld*.¹¹

Justice Robert Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* also contains language that proponents of broad Presidential war power claim supports their position.¹² In addition, extrajudicial statements by Supreme Court Justices support the President's

12 (2006); Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145 (2005); S. Amend. 1977, 109th Cong., adopted by 90-9 vote in Record Vote No. 249. See also CONG. REC. S11-070-072 (Leahy, McCain constitutionality discussion).

⁸ Curtis Bradley, David Cole, Walter Dellinger & Ronald Dworkin et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. OF BOOKS, Feb. 9, 2006, at 42, available at <http://www.nybooks.com/articles/18650>; Letter from David Barron, Harvard Law School Professor, et al., to Harry Reid, Senate Majority Leader et al. (Jan. 17, 2007) (asserting that Congress does have the power to give legal effect to its will with respect to U.S troop levels in Iraq), available at http://www.law.duke.edu/features/pdf/congress_power_letter.pdf; *Exercising Congress's Constitutional Power to End a War: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) [hereinafter *Hearings*].

⁹ THE FEDERALIST NO. 69, at 465 (Alexander Hamilton) (Jacob Cooke ed., 1961).

¹⁰ *Ex parte Milligan*, 71 U.S. 2, 139 (1866).

¹¹ 126 S. Ct. 2749, 2773 (2006). The *Hamdan* Court's reference to Chase's dictum was also dicta.

¹² "I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

exclusive Executive power to move troops and to direct campaigns.¹³ These statements notwithstanding, the Supreme Court has never invalidated legislation because it interfered with the President's Commander in Chief power to conduct military operations.¹⁴

The Administration's claim of unchecked power to conduct battlefield operations, a position that is ironically accepted by both the Administration and many of its critics, raises difficult questions as to where to draw the line between congressional and Executive power over the conduct of warfare. The Administration's argument starts with the proposition that Congress could not statutorily require the President to shift the 101st Airborne division from Baghdad to Anbar province. Similarly, Congress could not have directed FDR to launch D-Day at Brittany rather than Normandy, or to initiate an invasion of France in 1943 instead of attacking Italy. The Administration and its critics appear to agree on this point.

The Administration then argues that actions that are important to military success on the battlefield also fall within the sphere of exclusive presidential power. So, for example, what if commanders believe that a prisoner captured on the battlefield possesses information critical to the success of the battle? Proponents of broad Presidential power would argue that the issue of how, when, and where you interrogate him or her is just as much a tactical military decision as the decision about where troops should be placed and how campaigns should be conducted. So too, the Administration would argue that the power to make decisions about how and where to place spies to obtain information about enemy plans is a part of the President's power to conduct military campaigns.

¹³ William Howard Taft wrote in 1915 that the President's Commander in Chief power made it "perfectly clear that Congress could not order battles to be fought on a certain plan, and could not direct parts of the army to be moved from one part of the country to another." William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610 (1916). In 1917, Charles Evans Hughes claimed that, while Congress had unlimited power to create an army,

it is for the President as Commander-in-Chief to direct the campaigns of that army wherever he may think they should be carried on . . . Congress in the event of war is confided the power to enact whatever legislation is necessary to prosecute [the war] with vigor and success, and this power is to be exercised without impairment of the authority committed to the President as Commander-in-Chief to direct military operations.

CHARLES EVANS HUGHES, WAR POWERS UNDER THE CONSTITUTION, S. Doc. No. 65-105, at 7-8 (1st Sess. 1917).

¹⁴ See U.S. CONST. art. I, § 8, cls. 11, 14; David Barron, Testimony Before the United States Senate, Committee on the Judiciary on "Exercising Congress's Constitutional Power to End a War," Jan. 30, 2007, available at http://judiciary.senate.gov/testimony.cfm?id=2504&wit_id=6037.

Taking this premise a step further, the Administration argues that Congress could not interfere with the President's wartime decisions to engage in electronic surveillance against the enemy by requiring him to obtain a warrant. Similarly, if Congress could not limit the D-Day invasion force to a certain number of soldiers, then Congress could not disapprove the President's surge strategy in Iraq.

Once one accepts the Administration's starting proposition that the President has broad exclusive power to make tactical battlefield decisions, a proposition most commentators appear to accept, the possibilities for extension seem almost limitless.¹⁵ Yet, as this Article will demonstrate, that starting proposition is erroneous.

The critical flaw in the basic premise supporting exclusive presidential powers in war is that it ignores Congress's own panoply of war powers. Arrayed against the President's sole war power as Commander in Chief, the Constitution vests Congress with powers to declare war, issue letters of marque and reprisal, to raise armies and navies, to make rules concerning captures on land and water, and to make rules for the regulation of the army and navy.¹⁶ Furthermore, congressional authority to define offenses against the law of nations, its power to appropriate funds, and its power to make all laws which shall be necessary and proper for carrying into execution its powers are also important wartime powers.¹⁷ Congressional power over warfare also seems logically limitless, and the Constitution seems to provide Congress with substantial power to check virtually all the President's Commander in Chief powers. Indeed, Chief Justice Marshall once observed that the "whole powers of war" are vested in Congress.¹⁸

Despite the widespread debate and criticism, the Administration's underlying theory of the relationship between the President's Commander in Chief power and Congress's war powers has not been examined.¹⁹ As two

¹⁵ In *Youngstown Sheet & Tube*, Justice Jackson wrote of the necessity, yet difficulty, of limiting the President's Commander in Chief powers:

[j]ust what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.

343 U.S. 579, 641–42 (1952) (Jackson, J., concurring).

¹⁶ U.S. CONST. art. I, § 8, cls. 11–14.

¹⁷ *Id.* at § 8, cls. 1, 10, 18.

¹⁸ *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1800).

¹⁹ Saikrishna Prakash, *Regulating the Commander in Chief*, 81 IND. L.J. 1319, 1319, 1323 (2005); Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807, 825 (2006) (agreeing with Prakash that

Administration critics recognize, “[f]or the past eighty years, no scholar has undertaken an in depth analysis of the proper line of demarcation between the Commander in Chief’s exclusive power over battlefield operations and the areas where Congress and the President share concurrent authority.”²⁰

For the last half of the twentieth century, the focus of scholarly and political debate has been on the President’s power as Commander in Chief to *initiate* warfare, not the allocation of power between the President and Congress to *conduct* warfare authorized by Congress. Modern presidents asserted a power to initiate warfare without congressional authorization, a position hotly debated in Congress, the courts, and the academy. Even the passage of the War Powers Resolution of 1973 did not quell the dispute between Congress and the President as to the extent of independent Executive authority to initiate warfare.²¹ This debate has largely subsumed and submerged the important related, yet independent, question of the scope

an “exhaustive analysis” of the Commander in Chief power “has not yet appeared in print in any book or article of which either of us is aware”).

After this Article was accepted for publication, and while it was in the editing process, a lengthy two-part article analyzing the relationship between the Commander in Chief power and Congress’ war powers was published by the *Harvard Law Review*. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at its Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008).

²⁰ Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 171–72 n.395 (2004). The one scholar Jinks and Sloss mention is Clarence A. Berdahl, whose book, *War Powers of the Executive in the United States*, first published in 1920, takes a sweeping view of the Commander in Chief power that might support at least some of the Administration’s claims. See also Prakash, *supra* note 19, at 1323 (claiming that “far too many” have avoided undertaking the historical research necessary to determine the proper boundaries of the President’s Commander in Chief power); see also Michael Ramsey, *Torturing Executive Powers*, 93 GEO. L.J. 1213, 1242 n.116 (2005) (arguing that some line must be drawn between permissible and impermissible congressional military regulations, and tentatively suggesting such a line, but noting that the author has not made a detailed study of the matter). The one work that Jinks and Sloss appear to have overlooked is Francis Wormuth and Edwin Firmage’s 1986 book *To Chain the Dog of War: The War Power of Congress in History and Law*, which does devote a chapter to the Commander in Chief Clause. For helpful recent studies addressing the scope of the President’s Commander in Chief power to conduct warfare, see also LOUIS FISHER, *PRESIDENTIAL WAR POWER* (2d ed. 2004); David Gray Adler, *The Law: George Bush as Commander in Chief: Toward the Nether World of Constitutionalism*, 36 PRES. STUDIES Q. 525 (2006); David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT’L L. & FOREIGN AFF. 75, 130–35 (2007).

²¹ War Powers Resolution, 50 U.S.C. §§ 1541–48 (2000).

of the President's Commander in Chief power to conduct a war that Congress *has* duly authorized.²²

This Article will address that largely unexplored question, and will challenge the underlying premise that the President has exclusive control over operational and tactical decisions involving the conduct of military operations in wartime. Part I of the Article discusses various attempts to draw a line between the President's Commander in Chief powers and congressional war powers once war has been authorized and initiated. Part II will review the history of the Commander in Chief Clause, as well as congressional efforts to limit the Executive's discretion in fighting a war. Part

²² Professors Barron and Lederman claim that academic war powers scholarship has generally overemphasized questions of Congress' abdication of its constitutional war powers and therefore not adequately addressed Executive use of military force in disregard of legislative will. Barron & Lederman, *supra* note 19, at 698–704. The reason that war powers scholars have often focused on the problem of congressional silence or abdication is that until recently the primary scholarly debate involved the initiation of warfare and not its conduct. Many scholars and courts concluded that the President had no independent power to initiate warfare and therefore argued that congressional silence or acquiescence could not empower the Executive to initiate hostilities abroad. *See, e.g.*, sources cited in note 19 *supra*. Where, however, Congress set clear limits to the Executive's war-making authority, as in the War Powers Resolution, scholars vigorously debated the extent, if any, of the President's preclusive authority to act despite congressional will to the contrary. Compare Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984) with J. Terry Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME L. REV. 187 (1975). The Courts, however, refused to decide the issue of the War Powers Resolution's constitutionality, despite various cases which posed the question. *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987), *aff'd*, No. 87-5426 (D.C. Cir., Oct. 17, 1988); *Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

The reason that questions of Executive power to act in defiance of legislative will has now resurfaced is not because Congress has been less acquiescent in the war on terror, for it has not. Nor has the Supreme Court seriously grappled with the boundary between legislative and Executive power in conducting warfare against terrorists. *Hamdi* and *Hamdan*, for example, both principally involved the question of whether Congress's authorization for war provided the requisite statutory authority for the President to take actions which, in the absence of such authority, would conflict with prior congressional statutes. The reason that the question of Presidential power to act in disregard of congressional will has now come to the fore is not found in a new congressional and judicial assertiveness, but rather, as Barron and Lederman point out, due to the Bush Administration's articulation of extremely broad theories of Executive power to conduct warfare and override legislative enactments, combined with the ambiguous and untraditional nature of the war on terror which raises more questions as to Congress's power to control how a war is fought. What has dramatically changed is the focus of scholarly inquiry from which branch initiates warfare to which branch can control the conduct of warfare once initiated.

III will discuss the implications and lessons of that history, arguing that as a matter of history, policy, and constitutional theory, Congress has broad, concurrent power to determine both strategies and tactics in fighting the war it has authorized. This last Part will set forth a definition and understanding of concurrent powers over the conduct of war, an area which has thus far remained largely unexplored in both academic literature and judicial decisions.

Separation of powers doctrine generally operates on what has been termed a horizontal axis to draw subject matter lines to separate and demarcate the proper boundaries between legislative, executive, and judicial authority.²³ The powers of Congress and the President to control the conduct of a war authorized by Congress is best understood, however, if viewed sequentially, not horizontally. Rather than drawing a boundary between legislative and executive power based on subject matter or some other normative principle, the two branches have concurrent constitutional power over the conduct of authorized warfare. Those powers are divided in practice by timing, not subject matter. The President has the power of initiative, the ability and authority to act quickly in the face of rapidly changing wartime realities in the theater of action. Congress, on the other hand, has a more deliberative, reflective power, allowing it to check and limit presidential initiative both *before* and *after* the Executive acts.

I. THEORIES OF THE ALLOCATION OF AUTHORITY BETWEEN CONGRESS AND THE PRESIDENT OVER THE CONDUCT OF WARFARE

Scholars and judges have developed or suggested several theories in an effort to draw a line between the Executive's Commander in Chief powers and Congress's broad war powers. These theories attempt to articulate the proper allocation of authority between Congress and the President over the conduct of warfare. They start by accepting the Administration's premise that the Commander in Chief has some preclusive substantive authority to conduct battlefield operations, but seek to limit that Executive power.

A. *International Law/Human Rights Theory*

The first theory relies on the congressional authority to implement international law.²⁴ One formulation of this theory accepts that the President

²³ *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 751 (1999).

²⁴ Jinks & Sloss, *supra* note 20, at 176-78; *Debate: Allocating the Nuclear War Powers Under the Constitution*, in *FIRST USE OF NUCLEAR WEAPONS* 94, 98-99 (Peter Raven Hansen ed., 1987) [hereinafter *Debate*] (Testimony of John Norton Moore,

has sweeping power to conduct military operations, which would ordinarily preclude Congress from interfering with the President's control over battlefield operations. However, Congress's power to implement international law permits it to enforce treaty provisions, and in doing so exert some control over battlefield operations. An example might be legislation that enforces the international prohibition on attacking undefended towns or the Geneva Conventions' rules on the treatment of prisoners.²⁵

Another formulation of this theory relies heavily on the principle that the President cannot violate fundamental human rights norms such as the prohibition on torture or genocide.²⁶ Congress could legislate to force the President to comply with such human rights norms.

B. Homefront/Battlefield Distinction Theory

Another theory would draw a line between the President's control over battlefield operations and Executive initiatives undertaken in the United States, purportedly to support military operations abroad. Indeed, that distinction was a basic thrust of both the majority and Justice Jackson's opinions in *Youngstown Sheet & Tube Co. v. Sawyer*.²⁷ Under this theory, domestic surveillance of U.S. citizens allegedly communicating with the enemy would be treated differently than spying on the enemy in the theater of military action. So it would follow that the President's power to detain an American citizen seized at a U.S. airport as an "enemy combatant" would be different from the power to detain an American citizen captured on the battlefield. This analysis is supported by the Supreme Court's opinions in *Hamdi* and *Hamdan*, which suggest that the President's Commander in Chief power should be limited to military actions taken on or near an actual battlefield.²⁸ In *Hamdi*, the plurality distinguished between "initial captures on the battlefield," which were unreviewable, and the review process required "when the determination is made to *continue* to hold those who have

distinguishing congressional authority to prohibit weapons already barred by international law from weapons that are not).

²⁵ Jinks & Sloss, *supra* note 20, at 174–77. For example, Jinks and Sloss argue that "[i]f there were no international legal rule prohibiting, for example, the bombing of undefended towns, then Congress could not create such a rule; it would be beyond the scope of Article I." *Id.* at 176–77.

²⁶ See generally Koh, *supra* note 7.

²⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 579–89, 634–55 (1952). See also Jinks & Sloss, *supra* note 20, at 174–75 (distinguishing congressional power to regulate the treatment of detainees held in long-term captivity from the treatment of detainees on the battlefield).

²⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (plurality); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2782 (2006).

been seized.”²⁹ While the plurality was willing to “accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide,” it recognized that “it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”³⁰ Though the Court allowed the President power to detain an American citizen captured on a foreign battlefield, it emphasized the narrow “context” in which it reached that conclusion: “a United States citizen captured in a *foreign* combat zone.”³¹

Similarly, Justice Stevens’s opinion in *Hamdan v. Rumsfeld* rejecting the Administration’s attempt to unilaterally establish military commissions to try alleged terrorists was premised on the distinction between military necessity on the actual battlefield in the midst of combat and the claimed necessity to detain or try a detainee several years after his or her removal from the battlefield. For Justice Stevens and the plurality, military commissions to try enemies who violate the laws of war—the type the Bush Administration sought to implement—responded to the “need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield.”³² The plurality found, however, that the Administration failed “to satisfy the most basic precondition” for its establishment of military commissions—“military necessity.”³³ Hamdan’s tribunal was “appointed not by a commander in the field of battle, but by a retired major general stationed away from any active hostilities,” and he was not “charged . . . with an overt act . . . in a theater of war.”³⁴

Justice Stevens, in a section of the opinion representing the Court’s majority, addressed the distinction between military necessity on the battlefield and the general conduct of warfare in discussing the statutory requirement that procedures for military commissions must be the same as those used to try American soldiers in courts martial (which they clearly were not) unless the Administration could demonstrate that the court martial procedures would not be “practicable.” The Court emphasized that the requirement that any deviation be necessitated by a showing of the

²⁹ *Hamdi*, 542 U.S. at 534.

³⁰ *Id.* at 535.

³¹ *Id.* at 523. Apparently, the Administration was uncertain enough as to whether the Supreme Court would permit executive detention of an enemy citizen captured in the United States that it chose to prosecute Jose Padilla on criminal charges rather than continue to detain him as an enemy combatant and risk Supreme Court review of that detention.

³² *Hamdan*, 126 S. Ct. at 2782 (plurality).

³³ *Id.* at 2785.

³⁴ *Id.*

impracticability of court martial procedures “strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war.”³⁵ The Court stated that the President “may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers,”³⁶ and suggested that whatever independent power, if any, the President has to convene such commissions is confined to action taken in the actual theater of war or on the field of battle.³⁷

C. General Rules/Tactical Commands Theory

A third theory would draw a line between Congress’s power over warfare and the President’s Commander in Chief powers based upon a distinction between general rules or policy determinations concerning the conduct of warfare and specific tactical commands tailored to particular battles or campaigns.³⁸ This approach is consistent with both broad separation of powers theory and the text of the Constitution. Congress’s lawmaking function permits it to make broad policy decisions for the nation, including policy decisions relating to military affairs.³⁹ The President’s duties are to implement and enforce those policies set by Congress.

Furthermore, the constitutional concern with congressional interference with the President’s Commander in Chief power over warfare typically focuses on detailed congressional micromanagement of the conduct of war.⁴⁰

³⁵ *Id.* at 2793.

³⁶ *Hamdan* did not address the question of whether the President has any independent power absent congressional authorization to convene military commissions.

³⁷ *Hamdan*, 126 S. Ct. at 2774 n.23 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

³⁸ See, e.g., Ramsey, *supra* note 20, at 1236–42 (distinguishing between Congress’s ability to impose general regulations on the conduct of military personnel and a legislative effort to control specific tactical directions or provide tactical commands as to particular battles); *Hearings*, *supra* note 8, at 9 (testimony of David J. Barron, Professor of Law, Harvard Law School, distinguishing between day-to-day operational control over military issues and “rule-like definitions of the nature, size, and duration of the force available to the President”).

³⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952). (Jackson, J., concurring); *Hearings*, *supra* note 8 (testimony of Bradford Berenson, former Associate Counsel to President George W. Bush).

⁴⁰ As then-Assistant Att’y Gen. William H. Rehnquist expressed in a 1970 memo, a serious constitutional problem would arise “should Congress attempt by detailed instructions as to the use of American forces already in the field to supersede the President as Commander-in-Chief of the armed forces.” Memorandum from William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, to the Hon. Charles W. Colson, Special Counsel to the President, Re: The President and the War Power: South Vietnam

Recognizing that Congress has power to set broad policy or make general rules leaves the President with discretion over specific tactical decisions such as where to place troops, or which hill to attack, effectively addressing this concern.

This articulation of the respective powers of Congress and the President finds some support in the Constitutional text. Article I grants Congress the power "to make *rules* for the government and regulation of the land and naval forces" and "to make rules concerning captures on land and water."⁴¹ That language suggests that Congress has the power to make general rules for the detention, interrogation, or trial of enemy combatants captured by the United States.

D. Line Drawing Difficulties

While each of these three potential line-drawing theories has some appeal, none accurately describes the proper allocation of authority over the conduct of warfare between the legislature and the executive. The first, that the Executive's broad power to conduct military operations is limited primarily by Congress's authority to enforce international law, is underinclusive. While congressional power over warfare certainly includes the important authority to implement international law rules, the Constitution vests Congress with other war powers, such as the power to make rules concerning "captures" or for the "regulation of the army." These powers would allow Congress to proscribe military conduct that does not violate international law. Congress could, for example, require that prisoners of war captured on the battlefield be treated in a particular manner or transferred to particular locations if their detention were long-term, or given a particular type of hearing to determine their status, even if those rules were not required by international law.

The second theory of congressional power also is too limited in scope. While the line between battlefield and homefront is relevant, it does not accurately describe the extent of congressional power over the conduct of warfare. Congress has the power to prohibit torture or the summary execution of prisoners, or other abusive conduct by soldiers, whether such acts occur in the United States or on overseas battlefields. Congress also has the power to set funding limitations both for the military stationed in the United States and for military actions abroad. There is no reason to limit congressional authority to make rules and regulations for the military forces or for captures on land or seas to non-battlefield situations. The Constitution gives Congress

and the Cambodian Sanctuaries 21 (May 22, 1970) [hereinafter Rehnquist Memo].

⁴¹ U.S. CONST. art. I, § 8, cl. 14, cl. 11.

the power to make rules for captures on land or sea which necessarily includes battlefield captures because that is where most captures occur.

The third theory—based on the distinction between general rules and specific tactics—also has surface appeal, but is unworkable when applied to specific issues because the line between policy and tactic is too amorphous and hazy to be useful in real world situations. For example, how does one decide whether the use of waterboarding as a technique of interrogation is a policy or specific tactic? Even if it is arguably a specific tactic, Congress could certainly prohibit that tactic as antithetical to a policy prohibiting cruel and inhumane treatment. So too, President Bush's surge strategy in Iraq could be viewed as a tactic to promote a more stable Iraq, or as a general policy which Congress should be able to limit through use of its funding power. Congress can limit tactical decisions to use particular weapons such as chemical weapons, nuclear weapons, or cluster bombs by forbidding the production or use of such weapons, or simply refusing to fund them.⁴² Congress could also, however, enact more limited and specific restrictions to prohibit the use of nuclear weapons or land mines in a particular conflict or even a particular theater of war. Indeed, most specific tactics could be permitted or prohibited by a rule. In short, the distinctions between strategies and tactics, rules and detailed instructions, or policies and tactics are simply labels which are virtually indistinguishable. Labeling an activity with one of these terms is largely a distinction without a difference. Accordingly, these labels are not helpful to the real problem of determining the respective powers of Congress and the President.⁴³

The indeterminate nature of these labels is illustrated by the following examples. After the Nixon Administration's 1970 "incursion" into Cambodia, Congress sought to prohibit any such future actions by providing that "none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisors to or for

⁴² For example, Congress has limited the transportation, deployment, storage, and disposal of chemical and biological weapons. 50 U.S.C. §§ 1511–20 (1982), *repealed by* National Defense Authorization Act for Fiscal Year 1996, 110 Stat. 186. *See also* Pub. L. No. 98-525, 98 Stat. 2493 (1984). Congress has prohibited research and development of small mobile missiles. Pub. L. No. 98-94, 97 Stat. 614, § 206 (1983). *See* Allan Ides, *Congressional Authority to Regulate the Use of Nuclear Weapons*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?*, 80–82 (Peter Raven-Hansen ed., 1987).

⁴³ In a related separation of powers context, the Court has noted that "[o]ur separation-of-powers analysis does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural,' or 'political' as opposed to 'judicial.'" *Mistretta v. United States*, 488 U.S. 361, 393 (1989).

Cambodian military forces in Cambodia.”⁴⁴ Some commentators argued that a presidential decision to attack North Vietnamese sanctuaries in Cambodia was a “tactical maneuver” within the President’s “complete and exclusive power,” and that therefore any congressional prohibition of such tactical decisions would be unconstitutional.⁴⁵ However, such a use of American military power clearly reflected a major policy decision that escalated the conflict into other sovereign states and had important effects and consequences for U.S. foreign policy. As one commentator put it, the incursion “was [not] purely a tactical field decision.”⁴⁶ Indeed, then-Assistant Attorney General William H. Rehnquist wrote that a congressional restriction providing that U.S. troops not be sent into Laos or Thailand in connection with the Vietnam conflict was accepted by the Executive, thereby suggesting that such restrictions did not impermissibly interfere with the President’s tactical military decisions as Commander in Chief.⁴⁷

Virtually all important decisions as to the conduct of a war—whether to escalate or de-escalate, institute a “surge,” treat prisoners consistently with the Geneva Conventions, etc.—can be framed as either “tactical” military decisions for the President to make as Commander in Chief or broad policy decisions for Congress to make under its war powers. Of course, certain decisions, such as “send this division to take this particular town,” for example, seem more “tactical” than a decision to invade a country like Cambodia in 1970. Nevertheless, as a general matter the policy/tactic dichotomy is unlikely to be helpful when analyzing disputes that arise between the President and Congress about the conduct of war. Congress is unlikely to enact laws that interfere with tactical command decisions unless it

⁴⁴ Special Foreign Assistance Act of 1971, Pub. L. No. 91-652, § 7(a), 84 Stat. 1942, 1943 (1971).

⁴⁵ JOHN NORTON MOORE, *LAW AND THE INDO-CHINA WAR* 566 n.22 (1972); Robert H. Bork, *Comments on the Articles on the Legality of the United States Action in Cambodia*, 65 AM. J. INT’L L. 76, 79–80 (1971); John Norton Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 AM. J. INT’L L. 38, 63 (1971) (noting that the facts “strongly suggest that the action is most appropriately characterized as a command decision incident to the conduct of the Vietnam War”); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 916 (1994) (concluding that “[g]iven the colorable tactical necessity for the Cambodian border incursion,” congressional restrictions prohibiting the President from taking such action would be unconstitutional); William H. Rehnquist, *The Constitutional Issues—Administration Position*, 45 N.Y.U. L. REV. 628, 638 (1970) (“The President’s determination to authorize incursion into these Cambodian border areas is precisely the sort of tactical decision traditionally confided to the Commander-in-Chief in the conduct of armed conflict.”).

⁴⁶ William D. Rogers, *The Constitutionality of the Cambodian Incursion*, 65 AM. J. INT’L L. 26, 35 (1971).

⁴⁷ Rehnquist Memo, *supra* note 40, at 21.

believes that the subject is important to national policy. But it is precisely those types of “policy” issues that the policy/tactic dichotomy is ill-equipped to resolve.

Even if one looks at decisions which appear on the surface to be of a tactical military nature, applying the policy/tactic distinction does not yield a clear result. If Congress, for example, were to instruct the President to bomb certain railway lines in enemy territory, that would seem to be a tactical military decision within the core Commander in Chief power. Generally it would be ludicrous for Congress to so interfere with the military’s conduct of warfare. But suppose railway lines are being used to transport thousands of civilians to death camps, as the Nazis did in World War II, and that, despite this knowledge, an American President decided not to use our air power to destroy those lines and thereby save thousands of civilians (a decision the Roosevelt Administration unfortunately made). Then, if Congress could summon the political will to enact legislation (presumably over Presidential veto) that required the President to bomb railway lines used to transport civilians to death camps, would it be an impermissible infringement on the President’s tactical decision making? Congress would be expressing the policy or rule that it wanted to use our military power to protect these civilians, leaving to the President the determination of how best to tactically implement that policy. Thus, destroying particular railways could reflect either a policy or tactic depending on the situation. The real question is not whether some decision can be described as either a tactic or general policy, but which branch of government should have ultimate authority to make that decision.

Moreover, to the extent that the concern is congressional micromanagement of the conduct of our armies in the field, the policy/tactic distinction does not effectively address that concern. For example, Bradford Berenson, the former Associate Counsel to President Bush, recently told a congressional committee that

if Congress were to enact a law providing that no American soldier could be sent into combat without body armor, there would be a strong argument that such an enactment impermissibly interferes with the commander in chief’s discretion to order lightly armed or lightly equipped troops to proceed by stealth into battle in appropriate circumstances.⁴⁸

But such a law clearly sets forth a general rule or policy. The objection to it is not that it is too narrowly focused on particular tactics, but that it sweeps too broadly, thus depriving the President of discretion and flexibility to

⁴⁸ *Exercising Congress’ Constitutional Power to End a War: Hearing before the Senate Committee on the Judiciary*, 110th Cong. (2007) (Testimony of Bradford A. Berenson, former Associate Counsel to the President).

prosecute the war. But precisely because laws effectuate general policies, they deprive the President of discretion which he or she claims is necessary to fight a war. Indeed, President Bush's objection to the McCain Amendment prohibiting torture or cruel and inhumane treatment was structurally similar to Berenson's—the rule, which expresses Congress's policy judgment, would deprive him of necessary discretion in special circumstances, to use methods of interrogation that would not be countenanced under the general prohibition. Thus, if the goal is to accord the Commander in Chief the maximum flexibility to fight a war, the policy/tactic distinction is of no use, and in fact is counterproductive.

Finally, attempting to draw any line based on how close a particular law comes to conveying tactical orders will lead legislators and executive officials to argue about the label to apply to a particular legislative restriction. This leads to an unsubstantive debate over labels, which does not confront the underlying realities and constitutional values that ought to be central to the debate over which branch should have ultimate control. The history of the pre-New Deal Supreme Court's attempt to deal with the overlapping authority between the states and federal government to regulate economic activity within a state that affects the broader economy suggests that this exercise in labeling will be unworkable and counterproductive. The Supreme Court analyzed economic activity in terms of formal categories such as direct versus indirect effects, an approach which proved to be unworkable and destructive in practice. This experience argues against proceeding down that path with a similar labeling approach in the equally murky area of conflicting authority between the President and Congress over the conduct of an authorized war.⁴⁹

The inability of any of these theories to accurately draw a coherent and useful line between Congress's supervisory power over the conduct of authorized warfare and the President's Commander in Chief power to conduct warfare leads to a normative and structural inquiry as to which branch ought to have power in which circumstances over the conduct of warfare.

E. Alternative Theories to Line Drawing: Balancing and Contextual Approaches

The first possibility is to eschew an attempt at drawing a clear line between the President's Commander in Chief power and Congress's war

⁴⁹ *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (“[Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as ‘production’ and ‘indirect.’”); cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

powers and adopt a contextual, balancing approach to determine whether Congress has impermissibly interfered with the President's Commander in Chief powers. In recent years, the Supreme Court has often employed an ad hoc balancing test to decide separation of powers issues, asking whether legislation disrupts the proper balance between the coordinate branches "[by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."⁵⁰ That type of analysis would assess the constitutionality of any particular restriction by asking whether the statute involved prevents the President "from accomplishing [his] constitutionally assigned functions" and whether the extent of the interference with the President's Commander in Chief powers is nonetheless "justified by an overriding need to promote objectives within the constitutional authority of Congress."⁵¹

Another balancing approach might examine elements of each of the different line-drawing theories of the President's Commander in Chief power, as well as the history of congressional regulation of the particular issue involved. This approach might question (1) whether Congress was implementing an international law norm, such as the prohibition against torture or cruel and inhumane treatment; (2) whether the regulation involved conduct occurring in a military theater abroad or activity in the United States more aptly characterized as domestic; (3) how detailed, specific, and tactical an intrusion into military matters Congress had enacted; and (4) whether this was an area, such as the trial of enemy combatants by military commissions, where Congress had a history of regulation.

A somewhat different contextual approach has been suggested by Professors Feldman and Issacharoff, who argue that "the constitutional test, in the spirit of Justice Jackson, should be whether Congress is defining the conflict in a way that makes realistic sense in the light of how modern conflict is actually fought and understood by modern combatants."⁵²

The critical difficulty with a contextual approach is its inherent ambiguity and lack of clarity, which tends to sharply shift the balance of power in favor of a strong President acting in disregard of congressional will. For example, the application of the Feldman and Issacharoff test asking whether the congressional restriction makes realistic sense in the modern world would yield no coherent separation of powers answer if applied to the current Administration's confrontation with Congress. It would undoubtedly embolden the President to ignore Congress's strictures. The President's

⁵⁰ *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (internal quotation marks removed)).

⁵¹ *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 485 (Kennedy, J., concurring) (1988).

⁵² Noah Feldman & Samuel Issacharoff, *Congress has the Power to Make and End War—Not Manage It*, SLATE, Mar. 5, 2007, <http://www.slate.com/id/2161172>.

advisors would argue that the McCain Amendment's ban on cruel and inhumane treatment, or FISA's requirement of a warrant, does not make realistic sense in the context of the contemporary realities of the war on terror in which we face a shadowy, ruthless non-state enemy that has no respect for laws or civilized conduct, a conclusion hotly disputed by those opposed to the President's policies. Focusing the debate over whether Congress has the power to control the treatment of detainees on the President's claim that the modern realities of warfare require a particular approach will merge the separation of powers inquiry of *who* has the power with the political determination of what the policy ought to be. Such an approach is likely to encourage the President to ignore and violate legislative wartime enactments whenever he or she believes that a statute does not make realistic sense—that is, when it conflicts with a policy the President embraces.⁵³

The contextual approach has a “zone of twilight” quality that Justice Jackson suggested in *Youngstown*.⁵⁴ Often constitutional norms matter less than political realities—wartime reality often favors a strong President who will overwhelm both Congress and the courts. While it is certainly correct—as Jackson noted—that neither the Court nor the Constitution will preserve separation of powers where Congress is too politically weak to assert its authority, a fluid contextual approach is an invitation to Presidents to push beyond the constitutional boundaries of their powers and ignore legislative enactments that seek to restrict their wartime authority.

Moreover, another substantial problem with a contextual approach in the war powers context is that the judiciary is unlikely to resolve the dispute.⁵⁵

⁵³ Such a test is also likely to invoke the very fears and passions that Madison and other Framers thought could lead to executive aggrandizement during wartime. *See, e.g.*, JAMES MADISON, LETTERS OF HELVIDIUS, NO. IV (1793), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 174 (G. Hunt. ed., 1906); *see generally infra* pp. 416, 421–22.

⁵⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

⁵⁵ For example, Professor Mark Rosen has recently suggested that Justice Jackson's position in *Youngstown*, that where the President and Congress have concurrent authority the President is categorically precluded from violating a congressional statute, might be replaced by a noncategorical rule that Presidential action inconsistent with statutory requirements would be strongly presumed to be unconstitutional, a presumption that might be rebutted only upon a showing of a compelling governmental interest and that the President's actions were narrowly tailored. Mark A. Rosen, *Revisiting Youngstown: Against the View that Jackson's Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1738 (2007). But that assumes that a court would determine when the President's assertion of a compelling interest was justified, an unwarranted assumption in the context of Presidential treatment of prisoners held abroad, secret wartime surveillance, or challenges to congressional restrictions on the troops abroad. What Cohen's approach would then lead to in practice would be executive claims that the President had a compelling interest to ignore the relevant

The persistent refusal of the judiciary to adjudicate the constitutionality of the War Powers Resolution strongly suggests that courts will often refuse to intervene to resolve disputes between the President and Congress over the constitutionality of a statute that a President claims impermissibly interferes with her conduct of an ongoing war.⁵⁶ This result leaves the political branches to engage in an intractable dispute over the statute's constitutionality that saps the nation's energy, diverts focus from the political issues in dispute, and endangers the rule of law.

Additionally, in wartime it is often important for issues relating to the exercise of war powers to be resolved quickly. Prompt action is not usually the forte of the judiciary.

If, however, a constitutional consensus exists or could be consolidated that Congress has the authority to check the President's conduct of warfare, that consensus might help embolden future Congresses to assert their power. Such a consensus might also help prevent the crisis, chaos, and stalemate that may result when the two branches assert competing constitutional positions and, as a practical matter, judicial review is unavailable to resolve the dispute.

Moreover, the adoption of a contextual, realist approach will undermine rather than aid the cooperation and compromise between the political branches that is so essential to success in wartime. In theory, an unclear, ambiguous division of power between the branches that leaves each branch uncertain of its legal authority could further compromise and cooperation. However, modern social science research suggests that the opposite occurs.⁵⁷ Each side in the dispute is likely to grasp onto aspects or factors within the ambiguous or complex reality to support its own self-serving position. This self-serving bias hardens each side's position and allows the dispute to drag on, as has happened with the ongoing, unresolved dispute over the constitutionality of the War Powers Resolution.

F. Broad Presidential Power Approach

The second alternative theory would be to make a judgment as to which branch is structurally and functionally better situated to make the ultimate

statutory restrictions and congressional counterclaims that he or she did not, claims that a court would be unlikely to resolve. That does not seem like a productive way to resolve disputes over congressional power to regulate the conduct of warfare.

⁵⁶ See, e.g., *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987).

⁵⁷ See Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORGANIZATIONAL BEHAV. & HUMAN DECISION PROCESSES 176 (1992); see also Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

decision on military tactics and strategies involving the conduct of warfare. It could be argued that, because the President has access to more and better information, has more expertise in wartime decisions, and can move more decisively and with greater speed, the President's Commander in Chief power to conduct war should predominate. So long as the President is making what can plausibly be viewed as a military, operational decision involving the conduct of an authorized war, his or her decision is preclusive, and Congress's involvement is constitutionally prohibited.

That position has the advantage of drawing a clear line that defines which branch has authority. It also approximates the Bush Administration's position. Nevertheless, it is inconsistent with the Constitution's design to provide checks on the President's power to conduct warfare. The Constitution's text provides such checks not only by requiring that Congress must authorize the initiation of warfare, but also by according Congress substantial power once war breaks out: to regulate captures, to provide rules for the armed forces, to provide funding for warfare, to raise an army, to define offenses against the law of nations, and to issue letters of marque and reprisal.⁵⁸ A virtually unlimited and unchecked presidential power to fight wars is not only inconsistent with the words of the constitutional text and the Framers' intent, but with the broad conceptions of checks and balances that our history has read into those words. Our Constitution has been correctly viewed as providing a system both strong enough to defend and sustain the Republic, yet weak enough to prevent one individual from arrogating to himself all power to conduct war. As the Supreme Court's *Hamdi* plurality succinctly put it, "a state of war is not a blank check for the President."⁵⁹

G. Reassessing the Scope of Commander in Chief Power: A Concurrent Power Approach

Given the fatal flaws in all of the approaches discussed above, perhaps the suppositions that underlie those theories should be reexamined before formulating a new theory. The alternative approach to be explored in the remainder of this Article starts by challenging the commonly accepted understanding that the President has exclusive authority over battlefield operations and that Congress cannot participate in the conduct of campaigns. As a matter of constitutional logic and history, that usually agreed on proposition is untenable.⁶⁰ As Part II of this Article demonstrates, throughout our history—from the Quasi-War with France to the Civil War to the

⁵⁸ See U.S. CONST. art. I, § 8.

⁵⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

⁶⁰ See Part II, *infra* pp. 415–45 for a full discussion of the restrictions Congress has placed on the Commander in Chief's power to conduct war throughout our history.

Vietnam conflict—on numerous occasions Congress has enacted legislation that interfered with the President's so-called exclusive authority over battlefield operations and campaigns. Moreover, the constitutional grant of authority to the President to be Commander in Chief was not designed by the Framers to preclude congressional authority over the conduct of warfare. Rather, the Framers' grant to Congress of the powers to raise and support armies, to declare war, to issue letters of marque and reprisal, and to provide rules for the armed forces and rules governing captures was designed to provide important checks on the President's Commander in Chief power. There is no basis in the text of the Constitution or logic to limit Congress's substantive power over the conduct of warfare powers and make them subservient to the President's Commander in Chief power. For example, Congress's power to raise an army means that it can raise an army with certain weapons, not others, and a certain number of troops and no more. As Professor Stephen Carter points out:

Nothing in the language or structure of the Constitution suggests a distinction between rules limiting the number of tanks and limiting the theatres of operation. One might, I suppose, try to argue that restrictions on the number of soldiers or amount of equipment are limits on what the armed forces shall *be*; stipulations on where or how these forces can fight are limits on what the armed forces may *do*. But that difference—if it is a difference—is merely semantical.⁶¹

Congress can therefore say the army shall not *be* one with nuclear weapons or that it shall have nuclear weapons but only use them in response to a nuclear attack—both of which would be important restrictions on the President's ability to use tactical nuclear weapons in a battlefield situation. Or the Congress could (and has) said that it will be an army that does not use ground troops in a particular conflict, or does not torture prisoners. All these restrictions, which Carter views as definitional and nearly always constitutional, effectively say, "We have created this army, not that one."⁶²

So too, the congressional power to declare or authorize war has been long held to permit Congress to authorize and wage a limited war—"limited in place, in objects, and in time."⁶³ When Congress places such restrictions on the President's authority to wage war, it limits the President's discretion to conduct battlefield operations. For example, Congress authorized President George H. W. Bush to attack Iraq in response to Iraq's 1990 invasion of

⁶¹ Stephen L. Carter, *War Making Under the Constitution and the First Use of Nuclear Weapons*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION WHO DECIDES?* 109, 113 (Peter Raven-Hansen ed., 1987).

⁶² *Id.*

⁶³ *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800).

Kuwait, but it confined the President's authority to the use of U.S. armed forces pursuant to U.N. Security Council resolutions directed to force Iraqi troops to leave Kuwait. That restriction would not have permitted the President to march into Baghdad after the Iraqi army had been decisively ejected from Kuwait, a limitation recognized by President Bush himself.⁶⁴

Yet that restriction seems to be the very kind of limitation on a President's tactical battlefield command that the commonly accepted premise would not permit. But if Congress can thus limit the purpose of the war against an enemy, why could it not impose other similar restrictions—limiting for example the theater of war, or even the places the military can attack? If the 1991 Persian Gulf Resolution was constitutional—and nobody claimed it was not—Congress could have authorized war against Germany for the purpose of protecting Britain and liberating Western Europe, while not permitting combat operations into Germany or other theaters of action such as the Middle East or North Africa. Congress would never have done so, but the 1991 Persian Gulf authorization suggests that it could have. The 1991 Persian Gulf authorization is not an anomaly; Congress has limited the objects, purposes, and tactics Presidents could use in conducting war throughout our history.

Congress and the President therefore *share concurrent authority* over the conduct of warfare once it has been authorized by Congress, and the only Commander in Chief power that Congress is constitutionally precluded from removing is the President's power to command the military. Congress can neither appoint itself military commander, nor establish a committee of Congress to be military commander. It cannot force the President to remove a commanding general that Congress does not like. Nor can Congress prevent the President from dismissing an officer, nor dictate which officers will be appointed to which commands. Nevertheless, even regarding military personnel decisions, Congress has adopted rules and procedures that have limited, without taking away, the President's powers to command.⁶⁵

⁶⁴ H.R.J. Res. 77, 105 Stat. 3 (1991). Bush and his national security advisor later explained that one of the reasons that he did not order a march to Baghdad was that "[o]ur stated mission, as codified in UN resolutions, was a simple one—end the aggression, knock Iraq's forces out of Kuwait, and restore Kuwait's leaders. To occupy Iraq . . . would have taken us way beyond the imprimatur of international law bestowed by resolutions of the Security Council . . ." GEORGE BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* 464 (1998). While Bush did not recognize the constitutional necessity for Congress's authorization of the war, the fact is that Congress did specifically authorize him to act and limited his discretion to use American troops to removing Iraqi troops from Kuwait as opposed to providing him unlimited authority to attack Iraq. See FISHER, *supra* note 20, at 172–73.

⁶⁵ See Richard Hartzman, *Congressional Control of the Military in a Multilateral Context*, 162 MIL. L. REV. 50 (1999) (arguing that Congress may prohibit the President from appointing a U.N. commander to command U.S. troops and, more generally, has the

While the two branches exercise concurrent authority over the conduct of warfare, in the case of conflict, Congress's power predominates. The President's superior access to information, closer contact with military commanders, and experience in dealing with foreign affairs and military matters means that in most situations he or she acts independently with the military commanders to determine military policy and strategy. However, in cases where Congress believes there are strong policy reasons to adopt a strategy or tactic, the more deliberative, representative body of government must be able to provide a check on the Executive's war power. Moreover, to say that the President and Congress share concurrent powers on a constitutional matter requires that the President obey the dictates of the laws Congress enacts. It is the Executive's duty to execute the laws, and only if the Constitution precludes Congress from exercising a certain power because it is granted solely to another branch can the President avoid complying with the law.⁶⁶

As set forth in greater detail in Part IV, this allocation of power shifts the constitutional analysis away from attempting to create a substantive division of power based on a dividing line or balancing test that assigns various subject matters to one branch or the other. Rather it recognizes the practical division of power based on timing and initiative. The greater speed with which the Executive can act, the need for a unified command, and the recognition that warfare cannot be conducted by committee led the Framers

power to enact selection criteria for commanders under the congressional power to make rules for the government and regulation of the armed forces). Compare this perspective with an opinion of the Justice Department's Office of Legal Counsel, which argues that such a restriction is an unconstitutional infringement on the President's Commander in Chief power. Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. Off. Legal Counsel 182 (1996). *See also* FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 87-104 (1986).

For example, at the outset of the Mexican War, President Polk sought to appoint Senator Thomas Hart Benton of Missouri to take command of all U.S. military forces in the field. However, since Major General Winfield Scott was a major general and it was understood that the Articles of War required that the officer of highest rank hold the post of commanding general, Polk sought to have Congress create a new position of Lieutenant General which would outrank Scott and therefore allow him to appoint Benton. Congress failed to do so, and Polk was forced to give Scott command of the campaign in Southern Mexico. *Id.* at 89. Moreover, the 1947 National Security Act required the Secretary of Defense, not the President, to give orders directly to the armed forces. In the days before Nixon's resignation, the Secretary of Defense and the Joint Chiefs of Staff took precautions to insure that no orders from the White House were transmitted to the army except through the constitutional and legislated chain of command. *Id.* at 92.

⁶⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) (describing third category).

to make the President, not Congress, the Commander in Chief with the independent constitutional power to conduct warfare once Congress decides that war is necessary. But that power was not to be unchecked, but rather subject to the oversight of the broadly representative branch of government.

As a structural matter, according Congress the power to override or limit the President's conduct of warfare preserves the balance of power between the branches. Were the President to have sole power over tactics and strategies to conduct warfare, Congress would, as a practical matter, have little check on the President. The only power Congress would then be able to exert would be to refuse to provide any funds for the war or to impeach the President, both of which require supermajorities (assuming the President vetoes an appropriations bill that contains no funding for a war), or to shut the government down if agreement cannot be reached. But to permit Congress to predominate where there is disagreement still gives the President substantial power to check congressional action. The President wields the veto power, which requires Congress to muster a supermajority if it wants to enact any restriction. The President's veto power ensures that nothing less than a strong consensus in Congress could limit his discretion with respect to the conduct of war.⁶⁷

Thus, in the absence of legislation to the contrary, the President can exercise the powers of a military commander under the laws of war to capture and detain prisoners, order soldiers into battle, and direct military campaigns. In most situations, the President is thus free to exercise discretion as to how to conduct warfare in the theater of combat, bounded only by the laws of war. Moreover, as a practical matter, Congress simply cannot control the ebb and flow of battles, direct troop movements, draw up battle plans, and the like. But the President's power to conduct war can be superseded or restricted by Congress if, for reasons of national policy, it desires to limit Executive discretion.

In sum, the better reading of the Commander in Chief Clause is that it provides the President independent constitutional authority and initiative to act in the absence of legislation to conduct military campaigns. However, it does not provide the President preclusive power to disregard legislation regarding the conduct of warfare.

⁶⁷ See Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383, 1385 (2006) (arguing that the separation of powers test should focus on the critical checks and balances functions in determining whether Congress or the President has exceeded its authority). The President also has, of course, the power to implement the law, and while he must enforce the law as Congress wrote it, he often has considerable enforcement discretion that allows the President to share the military's enforcement effort in a manner that is most consistent with both the law and the President's policy desires, as Lincoln did during the Civil War. See *infra* p. 437.

One might object that this theory of congressional power would allow Congress to micromanage a war by issuing detailed instructions to the military—and that such legislation would both be harmful to the conduct of a war and counter to the Framers' concerns about legislative interference with the management of war. It is undisputed that as a general matter Congress should not manage in detail military campaigns, and historically Congress has not done so. Nor is it generally wise for Congress to micromanage federal agencies other than the military. But Congress has the power to do so, and political (not constitutional) considerations have prevented Congress from doing so. Where a large majority of Congress feels strongly about a particular issue involved in the conduct of a war, as was the case when Congress enacted the McCain Amendment forbidding U.S. forces to use torture or cruel and inhumane treatment, it has the constitutional authority to limit the discretion of the President.

II. HISTORY OF CONGRESSIONAL RESTRICTIONS ON THE PRESIDENT'S POWER TO CONDUCT WARFARE

Throughout American history, Congress has placed restrictions on the President's power as Commander in Chief to conduct warfare. On numerous occasions, Congress has authorized the President to conduct warfare but placed significant restrictions on the time, place and manner of warfare. Congress has regulated the tactics the President could employ, the armed forces he could deploy, the geographical area in which those forces could be utilized, and the time period and specific purposes for which the President was authorized to use force. Its regulations have both swept broadly and set forth detailed instructions and procedures for the President to follow. This historical practice is consistent with the Constitution's text and Framers' intent, which made clear that the President was not to have the broad powers of the British King, but was subject to the control and oversight of Congress in the conduct of warfare.

A. *The Constitutional Design*

The Framers' decision to grant the President the power of Commander in Chief of the nation's armed forces was noncontroversial. The President was granted such power to ensure civilian supremacy and control over the military. One of the Declaration of Independence's accusations against King George III was that he had "affected to render the Military independent of and superior to the Civil Power."⁶⁸ The only real dispute in the state ratifying

⁶⁸ FISHER, *supra* note 20, at 12; see also David J. Luban, *On the Commander-in-Chief Power*, 81 S. CAL. L. REV. (forthcoming 2008), available at

conventions was whether to allow the President to command the army in person, which was thought by some to be dangerous. As George Mason, a delegate to the Constitutional Convention, noted in the Virginia Ratifying Convention, there was agreement as to "[t]he propriety of his being commander in chief, so far as to give orders and have a general superintendency."⁶⁹

The Framers generally expressed strong concerns about a wartime executive aggrandizing power. John Jay warned that "absolute monarchs will often make war when their nations are to get nothing by it,"⁷⁰ James Madison characterized war as "the true nurse of executive aggrandizement,"⁷¹ and Alexander Hamilton acknowledged that "[i]t is of the nature of war to increase the executive at the expence [*sic*] of the legislative authority."⁷²

Nevertheless, there can be no question that the Framers intended to vest in the President the power to conduct a duly authorized war as Commander in Chief. As Alexander Hamilton explained,

Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority.⁷³

While an earlier draft of the Constitution gave the Legislature the power "to make war," Madison and Elbridge Gerry moved to substitute *declare* for *make*, "leaving to the Executive the power to repel sudden attacks."⁷⁴

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026302 (arguing that the purpose of the Commander in Chief Clause was to ensure civilian control of the military); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (Jackson, J., concurring) ("The purpose of lodging dual titles in one man was to insure that the civilian would control the military . . .").

⁶⁹ 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 496 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES]. Joseph Story, in his *Commentaries on the Constitution*, wrote that, at the ratifying conventions, "[t]he propriety of admitting the President to be Commander in Chief, so far as to give orders and have a general superintendency, was admitted." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1492 (5th ed. 1891).

⁷⁰ THE FEDERALIST NO. 4, at 18, 19 (John Jay) (Jacob Cooke ed., 1961).

⁷¹ James Madison, LETTERS OF HELVIDIUS, NO. IV (1793), reprinted in 6 THE WRITINGS OF JAMES MADISON 174 (G. Hunt ed., 1906).

⁷² THE FEDERALIST NO. 8, at 44, 46 (Alexander Hamilton) (Jacob Cooke, ed., 1961).

⁷³ THE FEDERALIST NO. 74, at 500 (Alexander Hamilton) (Jacob Cooke ed., 1961).

⁷⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed., 1911).

Madison's motion carried at first by a vote of 7-2, but after Rufus King explained that "make" might be interpreted as authorizing Congress not only to initiate but also to conduct war, Connecticut changed its position, so that the vote was now 8 to 1 in favor of Madison's motion.⁷⁵ One can conclude from this sequence that the wording was changed to permit the Executive to repel enemy attacks and to conduct wars that Congress had initiated.

But did the Framers intend for the Commander in Chief power to allow the President to conduct military campaigns free from congressional interference? Two important aspects of the Constitution's text and historical background strongly indicate that they did not.

First is the Framers' use of the term Commander in Chief. The term was first introduced into English law by Charles I in 1639 during the First Bishops War.⁷⁶ Six years later, during the English Civil War, Parliament appointed Sir Thomas Fairfax Commander in Chief of its forces, "subject to such orders and directions as he shall receive from both Houses or from the Committee of Both Kingdoms."⁷⁷ The Commander in Chief's office did not possess unfettered, sole power to lead, but rather was made subordinate to a superior such as Parliament or the secretary of war, who could issue orders and instructions to him.⁷⁸ The Duke of Wellington complained that "the commander in chief cannot move a Corporal's Guard from one station to another, without a route countersigned by the Secretary of War. This is the fundamental principle of the Constitution of the British Army."⁷⁹

In 1775, George Washington was appointed "General and Commander in Chief" of the revolutionary army. Nonetheless, his commission as Commander in Chief did not accord him independence from the Continental Congress. Congress instructed Washington to follow the Articles of War it adopted, "and punctually to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of these United Colonies, or committee of Congress."⁸⁰ Congress realized that

whereas all particulars cannot be foreseen, nor positive instructions for such emergencies so before hand given but that many things must be left to your

⁷⁵ *Id.*; WORMUTH & FIRMAGE, *supra* note 65, at 107. The official journal of the Convention records, however, noted that on the first ballot the amendment was defeated 4-5, leading Abraham Sofaer to conclude that King might have changed more votes than Madison's journal reports. ABRAHAM SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 393 n.130 (1976).

⁷⁶ WORMUTH & FIRMAGE, *supra* note 65, at 105.

⁷⁷ *Id.*

⁷⁸ Adler, *supra* note 20, at 525, 528.

⁷⁹ *Id.* at 526-27; WORMUTH & FIRMAGE, *supra* note 65.

⁸⁰ 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774-89, 91, 96 (Worthington C. Ford et al. eds., 1904-1937).

prudent and discrete management, as occurrences may arise upon the place, or from time to time fall out, you are therefore upon all such accidents or any occasions that may happen, to use your best circumspection and (advising with your council of war) to order and dispose of the said Army under your command as may be most advantageous for the obtaining the end for which these forces have been raised⁸¹

Despite this grant of discretion, Congress continued to issue instructions on military tactics to the Commander in Chief. In 1775, it ordered Washington to intercept two British vessels,⁸² and to send General Gates to take command in Canada and to send to Canada "such small brass or iron field pieces as he can spare."⁸³ In December 1776, Congress ordered General Putnam to send forces to harass the enemy into New Jersey. Generally, Congress gave Washington the "full power to order and direct all things relative to the department, and to the operation of the war," but with the important limitation "until the Congress shall order otherwise."⁸⁴ While Congress often included in its instructions discretionary language such as "he shall judge proper" or "in case he should judge it practicable,"⁸⁵ sometimes this language was omitted.

A number of the state constitutions adopted during the revolution or shortly thereafter and still extant in 1787 provided that the governor of the state was to be Commander in Chief of its military forces, but contained explicit provisions subjecting that authority to the laws of the state.⁸⁶ For

⁸¹ *Id.* at 101, 108.

⁸² 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774-89, 276 (1775).

⁸³ 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-89, 448, 451 (1776).

⁸⁴ 6 JOURNALS OF THE CONTINENTAL CONGRESS 1774-89, 1027 (1776) (emphasis added).

⁸⁵ 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774-89, 348 (1775); 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774-89, 684 (1778).

⁸⁶ BENJAMIN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (1878). The Maryland Constitution of 1776 provided that the Governor of the State *shall alone* have the direction of the militia, and of all the regular land and sea forces, "under the laws of this state." *Id.* at 825 (citing MD. CONST. of 1776, art. XXXIII). For other states, *see also id.* at 275 (citing DEL. CONST. of 1776, art. 9 ("The president, with the advice and consent of the privy council, may embody the militia and act as captain-general and commander-in-chief of them, and the other military force of this State, under the laws of the same.")); *id.* at 966 (citing MASS. CONST. OF 1780, art. VII, Ch. 2, § 1 (subjecting Commander in Chief power to rules and regulations of the Constitution, and the laws of the land)); *id.* at 1288 (citing N.H. CONST. of 1784, art. I, § 26 (same)); *id.* at 1911 (citing VA. CONST. of 1776, art. IV, § 4 (the governor shall "alone have the direction of the militia, under the laws of the country")). The language in the New Hampshire Constitution was repeated verbatim in the constitution adopted in 1792, while the Delaware Constitution of 1792 changed the

example, the Massachusetts and New Hampshire Constitutions named the governor or president of the state Commander in Chief of the army and navy, and of all the military forces of the state, and entrusted the office with the powers “incident to the office of captain-general and commander-in-chief and admiral, to be exercised agreeably to the rules and regulations of the constitution and the laws of the land, and not otherwise.”⁸⁷

The British and revolutionary American history makes clear that the Commander in Chief did not have *sole* power to conduct warfare, but could direct military campaigns subject to legislative oversight. While some commentators claim that the Framers gave the President the Commander in Chief power to conduct wars because they concluded that the Continental Congress had proven itself ill-suited to that task during the Revolution,⁸⁸ it would have been odd and contradictory for the Framers to have used the same title to describe an exclusive power of the President that had been used to describe a position subordinated to Congress during the Revolution. Why would the Framers have used the term Commander in Chief to describe a power to conduct military campaigns free from congressional direction when it was that very title that Washington was given during the Revolution when he had been subjected to such direction?

Second, had the Convention sought to augment the President’s powers of Commander in Chief beyond what General Washington had possessed during

clause so that it did not contain any explicit language subjecting the Commander in Chief power to the laws of the state. *Id.* at 1302–03, 282.

In 1789, Representative Thomas Tudor Tucker proposed several constitutional amendments including one which would have deleted the President’s power to be Commander in Chief—instead providing him with the “power to direct (agreeably to law) the operations” of the armed forces. CLARENCE A. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 119 n.22 (1920). Clarence Berdahl’s study of Executive war powers suggests that Tucker’s purpose was to ensure that the President could not command in person, while Abraham Sofaer’s study argues that its purpose was to limit the President’s power to conduct war to the manner specified by Congress. ABRAHAM SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* 117 (1976). That the phrase “agreeably to law” was put by Tucker in parentheses suggests that his amendment was not introducing a new limitation on the President’s power to direct the operation of the armed forces, but rather simply reflects a common understanding contained in these state constitutions that the President’s power to direct campaigns was subject to law. In any event, none of Tucker’s proposed amendments ever got out of committee. 1 *ANNALS OF CONG.* 762–63 (Gales & Seaton 1834).

⁸⁷ POORE, *supra* note 86, at 966, 1303.

⁸⁸ Allan Ides, *Congressional Authority to Regulate the Use of Nuclear Weapons*, in RAVEN-HANSEN, *supra* note 42, at 69, 77. In fact, the main lesson that the revolution taught the Framers was that Congress had to be given substantial power to obtain monies to supply the army, for it was that problem and not the micromanagement of military affairs by the Continental Congress that had proven to be most vexing during the Revolution. Raven-Hansen & Banks, *supra* note 45, at 893.

the Revolution, it could have clearly done so by providing the Executive with the war powers the Commander in Chief had lacked during the Revolution. The Framers had in the British model of war powers a handy and well-known scheme for an Executive branch that possessed such strong war powers. But the Framers rejected that model, which, as articulated by Sir William Blackstone, assigned to the king the "sole prerogative to make war," to issue letters of marque and reprisal authorizing private persons to engage in warfare, and as the nation's first general, to raise and regulate the army and navy.⁸⁹ None of these war powers were given to the President. Rather, Congress was given the power to declare war, to issue letters of marque and reprisal, to raise armies and navies, to make rules concerning captures on land and water, and to make rules for the regulation of the army and navy.⁹⁰

The Framers made it clear that they rejected the British model of war powers. James Wilson argued that the British model "was inapplicable to the situation of this Country," a view shared by other Framers.⁹¹ Alexander Hamilton and James Iredell were even more explicit in distinguishing the powers of the British monarch and the American president.⁹² As Hamilton wrote in *Federalist No. 69*:

The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Britain but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy; while that of the British Kings extends to the *declaring* of war and *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the Legislature.⁹³

The assignment to Congress of the power to issue letters of marque and reprisal is instructive of the limitations on the Commander in Chief's power. By the late 1700s, the term *marque and reprisal* had come to have two meanings. The first, more traditional usage of the term was to denote letters issued by the king to private individuals—privateers, usually merchant vessels—which were outfitted with guns and authorized to fight on behalf of

⁸⁹ Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1201–02 (2006); EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 22–25 (1982).

⁹⁰ U.S. CONST. art. I, § 8.

⁹¹ Fisher, *supra* note 89, at 1202.

⁹² Adler, *supra* note 20, at 529.

⁹³ THE FEDERALIST NO. 69, at 464 (Alexander Hamilton) (Jacob Cooke, ed., 1961). James Iredell, later an Associate Justice of the Supreme Court, made the identical point in the North Carolina Ratifying Convention. 4 ELLIOT'S DEBATES, *supra* note 69, at 107–08.

the government.⁹⁴ By the late 1700s, the term had also come to mean, more generally, measures short of full-scale war that one government waged against another—known as reprisals.⁹⁵ The Framers meant to incorporate both meanings, and traditional letters of marque and reprisal were relied on during the United States' early wars when our naval forces were relatively weak or virtually non-existent.⁹⁶ By providing Congress with the authority to issue such letters, the Framers gave Congress not only power over the initiation of warfare, but also over the conduct of naval warfare, in particular the power to determine who would be authorized to fight on behalf of the government, and the scope of and limitations on their authorization.

The Framers assigned Congress the bulk of the federal government's war powers in large measure because of their fears of an unchecked wartime President. Again and again the Framers emphasized that the dangers of Executive aggrandizement inherent in warfare were to be checked by separating the sword and the purse and vesting control of raising and supporting armies in Congress.⁹⁷ Madison argued the power of the purse was "the most compl[ete] and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."⁹⁸ The Framers' specific intent that the power of the purse was to be a broad substantive check to control military activity is not only apparent in the remarks of the Framers, but in the Constitution's text, which supplemented the general legislative appropriation power with the specific power provided to Congress to raise and support armies and navies, a provision which could be seen as unnecessary but for the Framers' desire to emphasize and ensure that the means for controlling the Executive in wartime would be placed in Congress's hands.⁹⁹

Moreover, in the debates at the ratifying conventions, the Federalists countered the Antifederalist argument that the President could become a military despot by emphasizing that Congress was provided substantial powers to check the President's Commander in Chief power. Federalist George Nichols argued in the Virginia Convention that "[t]he President is to

⁹⁴ Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1043–44 (1986).

⁹⁵ *Id.* at 1044.

⁹⁶ *Id.* at 1044–45; see also Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 91–94 (2007).

⁹⁷ WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 30–31 (1994); Raven-Hansen & Banks, *supra* note 45, at 896–97.

⁹⁸ THE FEDERALIST NO. 58, at 394 (James Madison) (Jacob Cooke ed., 1961).

⁹⁹ See Raven-Hansen & Banks, *supra* note 45, at 890–99 (arguing that the power of the purse in national security matters was a substantive, not procedural, power).

command. But the regulation of the army and navy is given to Congress. Our representatives will be a powerful check here.”¹⁰⁰ Madison claimed that Congress’s funding and other war powers would provide a sufficient check on the President’s war powers because “[t]he purse is in the hands of the Representatives of the people. They have the appropriation of all monies—They have the *direction* and regulation of land and naval forces.”¹⁰¹ So too, in the North Carolina Ratifying Convention, James Iredell argued that while the President is to command the military forces, that power “will be found to be sufficiently guarded,” because Congress had been given many of the war powers of the British king.¹⁰² Richard Spaight, who had been a delegate to the Convention, argued that Congress could control the Commander in Chief because it alone had the power to raise and support armies.¹⁰³ Professor John Yoo summarizes this ratification history by arguing that “as commander-in-chief, the President would have the initiative in matters of war, but Congress could use its appropriations power to enforce its own policies.”¹⁰⁴

As a textual matter, the powers of the British king that were provided to Congress permit Congress to interfere with the President’s conduct of military campaigns. Congressional power to “make Rules for the Government and Regulation of the land and naval Forces”¹⁰⁵ clearly may be used to limit the President’s power to conduct military campaigns. To the extent that Congress can prescribe the mode of behavior for the armed forces it can tell the military how it can and cannot conduct warfare. This power could severely limit the permissible tactics a President may order during a military campaign. So too, the constitutional text that grants Congress power to “make Rules concerning Captures on Land and Water” affords Congress great discretion in determining how the military shall detain, interrogate, and try captured enemy soldiers.¹⁰⁶ Undoubtedly most importantly, the power to raise and support an army and navy was believed by the Framers to provide a “complete” check on the President’s power to conduct warfare. In short, the grant of powers to Congress that were traditionally exercised by the king contradicts the view that the President’s power as Commander in Chief is immune from congressional interference.

¹⁰⁰ DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1281 (State Historical Society of Wisconsin 1990) (John P. Kamiski & Gaspare J. Saladino eds.) (speech of June 14, 1788).

¹⁰¹ *Id.* at 1282 (speech of June 14, 1788) (emphasis added).

¹⁰² 4 ELLIOT’S DEBATES, *supra* note 69, at 107–08.

¹⁰³ *Id.* at 114.

¹⁰⁴ John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1660 (2002).

¹⁰⁵ U.S. CONST. art. I, § 8, cl. 14.

¹⁰⁶ *Id.*

B. Early History, The Quasi-War with France

Our first war with a European power subsequent to the Constitution's ratification, the undeclared so-called Quasi-War with France in the 1790s, illustrates Congress's use of its power to control the conduct of warfare. In response to increasing tensions between the United States and France, Congress enacted a series of carefully calibrated measures authorizing the President to conduct limited warfare against France. In May 1798, Congress authorized the President to act against armed vessels that had committed or were attempting to commit "depredations" on vessels belonging to U.S. citizens and to retake captured ships belonging to U.S. citizens.¹⁰⁷ In June 1798, Congress authorized private armed vessels of U.S. citizens to use force to defend against any "search, restraint or seizure" made by armed French vessels against them.¹⁰⁸ Less than a month later, Congress permitted the President to use U.S. naval vessels and grant special commissions to U.S. owners of private ships to subdue and seize and capture any armed French vessel within the jurisdiction of the United States or on the high seas.¹⁰⁹ In 1799, Congress provided the President with the power to seize American vessels bound for French ports.¹¹⁰

The Quasi-War with France led to a series of Supreme Court opinions in which the Court held that Congress could limit the President's power to conduct hostilities. In *Little v. Barreme*, a unanimous Court upheld the imposition of damages against a naval commander who had acted pursuant to a presidential order to seize a ship that he believed was illegally trading with France.¹¹¹ Chief Justice Marshall's opinion for the Court recognized that the President might have inherent power as Commander in Chief to seize vessels illegally trading with the enemy in a time of war.¹¹² Yet Congress had at least implicitly prohibited such military action when it authorized the President to seize ships traveling to French ports but did not provide similar authority for ships bound from a French port, as was the ship involved in this case.¹¹³ Marshall accepted that President Adams's construction of that statute—authorizing naval commanders to seize ships both going to and coming from French ports—was undoubtedly preferable from a military standpoint and would provide more effective enforcement of the embargo against France.¹¹⁴

¹⁰⁷ Act of May 28, 1798, ch. XLVIII, 1 Stat. 561 (1798).

¹⁰⁸ Act of June 25, 1798, ch. LX § 1, 1 Stat. 572 (1798).

¹⁰⁹ Act of July 9, 1798, ch. LXVIII §§ 1.2, 1 Stat. 578–79 (1798).

¹¹⁰ Act of Feb. 9, 1799, ch. 2, 1 Stat. 613 (1799).

¹¹¹ *Little v. Barreme* (The Flying Fish), 6 U.S. (2 Cranch) 170 (1804).

¹¹² *Id.* at 177–78.

¹¹³ *Id.*

¹¹⁴ *Id.* at 179.

Nonetheless, the Court enforced the law's limitation on the President's power to conduct military operations and imposed individual liability on the naval commander for following President Adams's illegal instructions.¹¹⁵

The Court's opinion in *Little v. Barreme* enforcing a legislative circumscription of the President's Commander in Chief powers in wartime is supported by several other cases arising out of the undeclared war with France. In *Bas v. Tingy*, the Court unanimously held that France was an enemy for purposes of a law that permitted the salvage of enemy ships, despite the absence of a declaration of war.¹¹⁶ Three of the four Justices who wrote *seriatim* opinions agreed that, in the words of Justice Chase, "Congress is empowered to *declare* a general war, or Congress may *wage* a limited war; limited in place, in objects, and in time."¹¹⁷ As Justice Washington stated, a limited, undeclared war is known as an imperfect war, and "those who are authorised to commit hostilities, act under special authority, and *can go no farther than to the extent of their commission*."¹¹⁸ Justice Paterson also agreed that an undeclared or imperfect war was nonetheless war, in which "[a]s far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations."¹¹⁹ In authorizing warfare against the French, Congress had severely limited the tactics President Adams could utilize; he was not authorized "to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels, lying in a French port."¹²⁰

The next year, in *Talbot v. Seeman*, Chief Justice Marshall reiterated the basic principle articulated by Justices Chase, Washington, and Paterson.¹²¹ Marshall wrote that "[t]he whole powers of war being, by the constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides" in determining whether Captain Talbot had a lawful right to seize an armed vessel commanded and manned by Frenchmen.¹²² Writing for a unanimous Court, Marshall recognized, as had Chase, Washington, and Paterson in *Bas*, that Congress may authorize either a general war or a limited, partial war.

These early cases contradict a broad claim of inherent Executive power over the conduct of warfare that Congress cannot interfere with. If Congress can deny the President the power to capture vessels believed to be trading

¹¹⁵ *Id.*

¹¹⁶ *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

¹¹⁷ *Id.* at 43 (emphasis added).

¹¹⁸ *Id.* at 40 (emphasis added).

¹¹⁹ *Id.* at 45.

¹²⁰ *Id.* at 43.

¹²¹ *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801).

¹²² *Id.* at 28.

with the enemy in a time of war, surely Congress can also regulate and limit the detention and interrogation of enemy combatants in a time of war. That Congress can proscribe certain military tactics in enforcing a trade embargo in a time of war means that it has the power to regulate and limit military tactics in wartime. As Chief Justice Marshall suggests, in the absence of legislation, the Commander in Chief's power would normally extend to capturing such vessels.

The *Little* case also indicates that Congress's regulation of military tactics can extend to and intrude on the President's tactical battlefield decisions. The "battlefield" of the 1790s Quasi-War with France was the high seas. Which ships should be targeted for capture is a tactical, battlefield decision. The Court, however, held that Congress could limit the Commander in Chief's power, even if the President believed such limitations interfered with his prosecution of the war, as Adams undoubtedly did in that case.

More generally, the Court held that Congress has the power to authorize limited, undeclared war in which the President's power as Commander in Chief would be restricted. In such wars, the Commander in Chief's power would extend no further than Congress had authorized. As President Adams recognized, Congress had as a functional matter "declared war within the meaning of the Constitution" against France, but "under certain restrictions and limitations."¹²³ Under this generally accepted principle in our early constitutional history, Congress could limit the type of armed forces used, the number of such forces available, the weapons that could be utilized, the theaters of actions, and the rules of combat. In short, it could dramatically restrict the President's power to conduct the war.

Subsequent congressional authorizations of the use of force reinforced this basic principle that Congress can authorize full or limited warfare as it chooses. Throughout the nineteenth century, Congress repeatedly authorized the President to use limited force against other nations, slave traders, and pirates.¹²⁴ When President Madison requested on June 1, 1812, that Congress consider declaring war, the House voted quickly to declare war. The Senate, however, considered limiting its authorization to war on the high seas, and a motion was passed to return the bill declaring war to the committee to authorize only warships and privateers to make reprisals against Britain.¹²⁵ However, when the modified bill limiting the war to the high seas was

¹²³ FISHER, *supra* note 20, at 24 (citing 9 THE WORKS OF JOHN ADAMS 81 (Charles Fisher Adams ed., 1854)).

¹²⁴ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2073 (2005). As Professors Bradley and Goldsmith point out, most authorizations to use force in U.S. history have been of a limited, partial nature. *Id.*

¹²⁵ FISHER, *supra* note 20, at 38; DONALD R. HICKEY, THE WAR OF 1812, A FORGOTTEN CONFLICT 44-46 (1989).

reported back for final action, it was defeated by a tie vote.¹²⁶ The Senate finally approved the declaration of war by a vote of 19-13.¹²⁷ The declaration of war authorized the President to use "the whole land and naval force of the United States."¹²⁸

In declarations of war after 1812, Congress continued the practice of providing that the President is authorized and directed to employ the entire naval and military forces of the United States¹²⁹ against the enemy nation.¹³⁰ These authorizations of force are all premised on congressional power to either authorize a partial, limited war or a full war. Particularly in the context of the debate in the Senate as to whether to authorize limited warfare against Britain in 1812, the best explanation for the language in all of these declarations of war directing the President to employ the entire military force of the United States is that the declaration of war did not automatically give the President unlimited power to use all the armed forces of the United States. Congress could limit the methods and means of warfare, and therefore determined to explicitly grant the President broad authority.

During the Quasi-War with France, Congress also significantly narrowed the President's discretion to give orders to soldiers. The original laws for the regulation of the military had directed soldiers "to observe and obey the orders of the President of the United States."¹³¹ In 1800, Congress amended

¹²⁶ 12 ANNALS OF CONG. 270-71 (1812).

¹²⁷ *Id.* at 297-98.

¹²⁸ Act of June 18, 1812, ch. 102, 2 Stat. 755 (1812).

¹²⁹ See J. Res. of December 11, 1941, ch. 564, 55 Stat. 796 (World War II: Germany); J. Res. of June 5, 1942, ch. 325, 56 Stat. 307 (World War II: Rumania); J. Res. of June 5, 1942, ch. 324, 56 Stat. 307 (World War II: Hungary); J. Res. of June 5, 1942, ch. 323, 56 Stat. 307 (World War II: Bulgaria); J. Res. of Dec. 11, 1941, ch. 565, 55 Stat. 797 (World War II: Italy); J. Res. of Dec. 8, 1941, ch. 561, 55 Stat. 795 (World War II: Japan) (identical to German resolution except for identity of enemy); J. Res. of Dec. 7, 1917, ch. 1, 40 Stat. 429 (World War I: Austro-Hungary); J. Res. of Apr. 6, 1917, ch. 1, 40 Stat. 1 (World War I: Germany); Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 ("[The President is] directed and empowered to use the entire land and naval forces of the United States."); Act of May 13, 1846, ch. 16, 9 Stat. 9.

¹³⁰ Professors Goldsmith and Bradley note that all of the U.S. declarations of war expressly distinguish the declaration from the authorization to use force, and also point out that no one has ever analyzed the significance of this distinction. Bradley & Goldsmith, *supra* note 124, at 2047, 2063-64. They suggest that one reason for this practice may stem from the fact that a declaration of war may not have served the function of providing congressional authorization for the President to use military force. *Id.* at 2064-66. Here I suggest a related reason: that Congress can limit the President's use of force even when it declares war, and that conversely, Congress wanted to make clear that it was authorizing and directing the President to employ the entire military force.

¹³¹ Act of Sept. 29, 1789, ch. 25, § 3, 1 Stat. 95, 96.

the duty to obey commands to specifically prohibit soldiers from executing unlawful orders issued by superior officers.¹³² It follows that today Congress could use its power to make rules for the government and regulation of the armed forces to prohibit military officers from obeying and executing a specific order such as to torture a prisoner, to use waterboarding or any other techniques deemed inhumane against a prisoner, or to deploy a particular weapon to engage in any tactic or method of war Congress deemed inappropriate.¹³³

Congress also extensively debated whether the President had sole power as Commander in Chief over at least some aspects of the conduct of the Quasi-War with France. A number of Federalist members of Congress took the position that Congress could not restrict the President's power to use naval vessels outside U.S. territorial waters or as convoys.¹³⁴ Congressman Harrison Gray Otis argued that

[i]f a naval force was raised, it would rest with the President how it should be employed, as he was commander-in-chief. The Legislature could say whether the vessels should be employed offensively or defensively, but to say at what precise place they were to be stationed, was interfering with the duty of the commander-in-chief.¹³⁵

Similarly, Congressman Robert Harper contended that Congress had no "right to direct the public force."¹³⁶ If for example, "we were at war with Great Britain, [Congress] should have no right to say to the President, attack Canada or the Islands."¹³⁷

The Republicans argued back that Congress had the power to limit and define the objects with which and upon which the naval vessels could be employed, and that (in defining those objects) Congress could dictate where the President could place the vessels and the uses he could make of them. For

¹³² 2 Stat. 97 (1800), art. 14.

¹³³ Indeed, during the Civil War, Congress amended the Article of War to prohibit any U.S. officer or soldier from "employing any of the forces under their respective commands for the purpose of returning fugitives from service or labor." Act of Mar. 13, 1862, ch. 40, § 1, 12 Stat. 354.

¹³⁴ In June 1797 Republicans sought to limit the employment of U.S. naval vessels to "within the jurisdiction of the United States" and to prevent their use of convoys outside United States waters. See 7 ANNALS OF CONG. 289, 294, 368 (1797) (Sen. Albert Gallatin, William B. Giles, and John Williams, respectively). See generally SOFAER, *supra* note 75, at 148–50 for a discussion of the Republican proposals and Federalist objections.

¹³⁵ 7 ANNALS OF CONG. 290 (1797).

¹³⁶ *Id.* at 364.

¹³⁷ *Id.*

example, Congressman John Nicholas denied the right of the President to apply the naval force of the United States to any object he pleased:

When a force was raised for a particular object, [it was the President's] business to direct the manner in which this force should be used; but to say he had the right to apply it at his discretion, was to make him master of the United States; if that were the case, he said, the powers of that House were gone He insisted upon it that they had a right to say the vessels should be kept in the river Delaware, if they pleased; the President might afterwards direct their conduct.¹³⁸

Republican leader Albert Gallatin distinguished between "the Constitutional power of the President as Commander-in-Chief to command, and the Legislative application of any force which may be raised by the United States."¹³⁹ For Gallatin, there was

an essential distinction between the power to command and the application of a force. To command is *certainly subordinate to applying the force*. The President of the United States is Commander-in-Chief of the Militia of the United States; but when that Militia is raised, *it is to be applied in a manner specifically directed by law*.¹⁴⁰

In Gallatin's view, then, the President's power to command was subordinate to congressional authority to determine how the force he commanded should be applied. In short, Gallatin's argument distinguished between the power to command and the substantive power to decide how and by what means warfare should be conducted.

A number of prominent Federalists did not disagree with Gallatin's basic distinction. Both Otis and another Federalist, Samuel W. Dana, agreed that Congress had the "right to define the object" of the naval vessels, but argued that it was not "convenient" to do so.¹⁴¹ Otis advanced a theory of concurrent power which was in some respects similar to that of Gallatin. "The President is Commander-in-Chief of the Army, and of the Militia when called out," he argued, "but Congress might, nevertheless, direct the use of them."¹⁴² Otis believed that the President had the power to use the naval vessels as convoys in the absence of congressional direction, "yet it does not follow that the Legislature shall not point out the particular manner in which [the naval vessels] shall be employed, and under what restrictions convoys shall or shall

¹³⁸ *Id.* at 362.

¹³⁹ *Id.* at 1456.

¹⁴⁰ *Id.* (emphasis added).

¹⁴¹ 5 ANNALS OF CONG. 365-66 (1797).

¹⁴² 5 ANNALS OF CONG. 1460 (1798).

not be granted.”¹⁴³ Both Otis’s and Gallatin’s positions would provide Congress substantial power to control the conduct of a war, including the manner in which naval vessels or armies would be deployed.

The House debate on the deployment of naval vessels during the 1790s, while instructive of arguments made as to Congress’s power to control the conduct of war, ended inconclusively. First, it was unclear whether members of Congress voted based on their constitutional positions, or whether they agreed with Congressmen Otis, Dana, and others that restrictions on the President’s power might be lawful, but inexpedient. Second, the House itself acted seemingly inconsistently; it voted to reject Republicans’ efforts to restrict the use of naval vessels to within the U.S. seacoast, and then essentially reversed its position the next day, adopting restrictions limiting the use of certain naval vessels to defending the seacoast and repelling any hostility towards vessels and commerce within their jurisdiction.¹⁴⁴

In any event, two conclusions are clear from our experience during the first war with a European power after the adoption of the Constitution. First, on various occasions Congress regulated the President’s conduct of the war, in some cases in great detail. Congress told the President which ships he could capture on the high seas;¹⁴⁵ limited his use of some ships to protecting commerce within our seacoast;¹⁴⁶ regulated in minute detail the personnel the President could deploy on each frigate of the United States;¹⁴⁷ “required” the President to “cause the most rigorous retaliation” on French citizens who mistreated captured American citizens;¹⁴⁸ enacted detailed regulations for the Navy proscribing the maltreatment or other abuse of any civilian while on shore;¹⁴⁹ provided detailed instructions for the detainment of prisoners

¹⁴³ *Id.*

¹⁴⁴ See An Act providing Naval Armament, ch. 7, 1 Stat. 523 (1797) (expired); 5 ANNALS OF CONG. 370 (1797) (statement of Rep. Sitgreaves) (“He was at a loss to account for the change of sentiment in the House since yesterday. He thought it was then the opinion that they ought to provide the force; and when provided, leave it to the disposal of the Executive, and that, if he thought proper to employ the frigates in the protection of our commerce beyond the jurisdiction line, he should be authorized to do so.”); SOFAER, *supra* note 75, at 148. In addition, the House voted at times to restrict the vessels’ use as convoys, but the Senate refused to concur, resulting in a compromise bill without the restriction. *Id.* at 150.

¹⁴⁵ *Little v. Barreme* (The Flying Fish), 6 U.S. (2 Cranch) 170 (1804).

¹⁴⁶ An Act providing Naval Armament, 1 Stat. at 525.

¹⁴⁷ *Id.* at 524 (“That there shall be employed on board each of the ships of forty-four guns, one captain, four lieutenants, two lieutenants of marines, one chaplain, one surgeon, and two surgeon’s mates . . .”).

¹⁴⁸ An Act vesting the power of retaliation, in certain cases, in the President of the United States, ch. 45, 1 Stat. 743 (1799).

¹⁴⁹ An Act for the better government of the Navy of the United States, ch. 33, 2 Stat. 45, 48 (1800).

captured on board French vessels;¹⁵⁰ and authorized the President to grant special, limited commissions to the owners of private armed ships of the United States to capture certain armed French vessels.¹⁵¹ Secondly, the Supreme Court clearly affirmed Congress's power to restrict the President's conduct of warfare. As Abraham Sofaer points out, "[t]he Supreme Court made clear that it regarded Congress as the ultimate source of authority on whether and *how* the nation would make war. Both branches could act . . . but Congress had the final say."¹⁵²

C. Civil War

The Civil War revived questions of congressional power over the conduct of warfare. At the outset of the war, frustrated with the delay of military action against the confederate army in Virginia, Republican Senator Lyman Trumbull pressed in a senatorial caucus a resolution directing an immediate movement of troops towards Richmond before July 20, 1861.¹⁵³ Reportedly backed by a group of fifteen Senators, but rejected in the caucus, President Lincoln was told that unless action was taken promptly, the resolution would eventually be forced through.¹⁵⁴ Shortly thereafter, the Army under General Irvin McDowell did launch a campaign towards Richmond, which made Trumbull's effort moot and resulted in the defeat at the first Battle of Bull Run.

The Radical Republicans' dissatisfaction with the conduct of the Union war effort led them to establish the Joint Committee on the Conduct of the War.¹⁵⁵ That committee was accused of intermeddling in military affairs, and General Robert E. Lee is reported to have remarked that the committee's efforts were worth two Army divisions to the Confederacy.¹⁵⁶ Despite these accusations, the committee took no legislative action to interfere with military campaigns, confining its work primarily to investigations of military corruption, negligence, and disastrous military decisions, which were well within congressional power.¹⁵⁷ While the committee and various members of

¹⁵⁰ An Act to further protect the Commerce of the United States, ch. 68, 1 Stat. 578, 580 (1798).

¹⁵¹ *Id.* at 579.

¹⁵² SOFAER, *supra* note 75, at 166 (emphasis added).

¹⁵³ A. HOWARD MENEELY, *THE WAR DEPARTMENT, 1861: A STUDY IN MOBILIZATION AND ADMINISTRATION 1867* (1928).

¹⁵⁴ *Id.*

¹⁵⁵ See generally BRUCE TAP, *OVER LINCOLN'S SHOULDER: THE COMMITTEE ON THE CONDUCT OF THE WAR* (1998).

¹⁵⁶ DAVID MCCULLOUGH, *TRUMAN* 258 (1992).

¹⁵⁷ TAP, *supra* note 155, at 2-9 (pointing out that the Committee gained notoriety for its wide-ranging investigations).

Congress sought to pressure Lincoln and the Union generals on military matters, Lincoln skillfully parried their pressure, compromising when necessary, but avoiding open confrontation.

The most extensive debate in Congress over the respective war powers of the President and Congress came over legislation to confiscate the property and free the slaves of rebels, known as the Second Confiscation Act.¹⁵⁸ Introduced by Senator Trumbull in January 1862, the original bill provided for the forfeit of real and personal property of rebels who either were in the Confederate armies or provided "aid and comfort" to the rebellion; declared the slaves of such individuals to be free; and instructed the President to use the military to confiscate property in districts that were "beyond the reach of civil process" because of the rebellion when he believed that military necessity or the safety, interest and welfare of the United States required.¹⁵⁹ At the time Trumbull introduced his bill, Lincoln was not in favor of immediately emancipating slaves or confiscating rebel property, and in fact he revoked orders by Army generals such as General David Hunter that purported to free slaves.¹⁶⁰

Some conservative Republican and Democratic Senators opposed to widespread confiscation and emancipation raised strong constitutional objections to the proposed legislation, including the argument that it improperly interfered with the President's prerogatives as Commander in Chief. They contended that the President, not Congress, possessed the power to order confiscation as he deemed militarily necessary.¹⁶¹ Senator Edgar Cowan argued that the Act was unconstitutional because, *inter alia*, the Constitution declares that the President is Commander in Chief of the Army and Navy, "investing him with the war-making power," and "[h]e is the commander directing and controlling it as he pleases, and only restrained in so far by Congress in that he must depend upon them to foot his bills and authorize his levies."¹⁶² Senator Orville Browning claimed that "the war-executing powers are vested in the President, in the executive department of the Government, and Congress has no more right to touch them or exercise them than it has to usurp and exercise the judicial functions of the Government."¹⁶³ "Congress can no more command the Army, or interfere

¹⁵⁸ An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes, ch. 195, 12 Stat. 589 (1862).

¹⁵⁹ CONG. GLOBE, 37th Cong., 2d Sess. 942 (1862).

¹⁶⁰ SILVANA R. SIDDALI, FROM PROPERTY TO PERSON: SLAVERY AND THE CONFISCATION ACTS, 1861–1862, at 99–108, 182–83 (2005).

¹⁶¹ See generally ALLAN G. BOGUE, THE EARNEST MEN: REPUBLICANS OF THE CIVIL WAR SENATE 221, 224–25 (1981); SIDDALI, *supra* note 160, at 120–66.

¹⁶² CONG. GLOBE, 37th Cong., 2d Sess. 1052 (1862).

¹⁶³ *Id.* at 1137.

with the command of it when in the field, than it can adjudicate a case at law or control the decisions of a court."¹⁶⁴

Opponents of the bill articulated several broad principles to support Congress's lack of power over the conduct of war. The first was that the conduct of war was governed by international law—the laws of war—and that those laws of war were to be executed by the President and not Congress. This position viewed the Constitution as granting the President the right and privilege to conduct war once Congress authorized hostilities—guided only by the common laws of war, which could not be violated, modified, or supplemented by statute. Senator Browning and other Senators argued that the law of nations provided all of the rules governing the types of enemy property subject to confiscation. The only question left unresolved was the manner of execution of those laws—a task performed by the President as Commander in Chief, not Congress.¹⁶⁵ Browning read the Constitution to permit Congress or the President to take only actions prosecuting the war that were in conformity with the law of nations.¹⁶⁶ Moreover, under the law of nations "[a]ll conceivable emergencies are provided for. We need not legislate to meet them. It is only necessary that the laws shall be executed."¹⁶⁷

Browning and other Senators were correct that the Framers of the Constitution understood international law to be binding on Congress in the same way that the Constitution was, and believed Congress without constitutional power to alter or contravene those laws.¹⁶⁸ Nonetheless, the opposition's war powers theory according the President sole power to implement and execute international law was subject to several obvious difficulties. Their theory essentially rendered superfluous many congressional war powers, especially the power to make rules concerning captures on land

¹⁶⁴ *Id.* at 1136.

¹⁶⁵ *Id.* at 1857.

¹⁶⁶ *Id.* To Browning and other opponents, captures on land and sea were not "subject to the control of municipal laws, unless such municipal laws conform to the laws of nations, and then they are of force only because of such conformity." *Id.*

¹⁶⁷ *Id.* at 1857–58. Senator Edgar Cowan argued that "[i]n the conduct of the civil war now waging in this country, the President is guided and controlled by these laws, nor has the Congress any power whatever to alter or change them, and bind him by so doing, against his consent" *Id.* at 1052. See also Senator John B. Henderson's arguments to same effect. *Id.* at 1573.

¹⁶⁸ Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1084 (1985). Indeed, Lincoln's Attorney General explicitly affirmed that constitutional principle, as did several Justices of the Supreme Court in the aftermath of the Civil War. *Id.* at 1108–10. By the twentieth century, Congress's power to enact legislation in violation of international law became well established, at least with respect to non-fundamental norms of international law. See *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988).

and water. For, according to the opposition, all the rules concerning such captures were already contained in the laws of war and required executive, not congressional, execution.¹⁶⁹

More fundamentally, the opposition's law of nations theory ignored the problem that wide swaths of warfare were either totally unregulated by the laws of war, regulated by vague rules, or left to the discretion of each nation. In particular, the Supreme Court had already pointed out in *Brown v. United States* that the power to confiscate enemy alien property was not mandatory under the law of nations but rather was left to the discretion of each nation.¹⁷⁰ Under our Constitution, that discretion was to be exercised by Congress.¹⁷¹ In general, international law not only prohibited certain conduct, but also gave each nation certain rights, and Congress could decide whether to exercise those rights or not. Finally, when international law was vague—which was not infrequent—Congress was given the power not only to punish offenses against the law of nations, but also to *define* such offenses.¹⁷²

In response to this problem, conservative Senators articulated a second, related theory justifying absolute Presidential power over the conduct of war. To the extent that the laws of war were discretionary, they argued that their application depended on judgments as to the military necessity of a particular measure such as the capture of enemy property. But according to these Senators, the judgment of military necessity was, by its nature, an executive rather than a legislative function.¹⁷³ As Senator Jacob Collamer argued, “I insist that the Executive, his generals, the military power, are the sole judges of what is military necessity.”¹⁷⁴ This argument ignored the many decisions involving determinations of military necessity explicitly given to Congress: whether to raise an army or navy for the nation's defense, how many soldiers and sailors to provide, whether to authorize private persons to conduct hostilities, and, more particularly, what enemy property should be confiscated.

The opposition also attempted to analogize the President's powers to those of the English king. Senator Cowan argued that congressional power was

¹⁶⁹ Senator Henderson claimed that Congress could enact procedural rules for the condemnation of property, “but cannot determine what is or what is not the subject of capture.” CONG. GLOBE, 37th Cong., 2d Sess. 1573 (1862). But there seems no reason to distinguish between congressional power to determine the property subject to be captured and the process used to effectuate its condemnation as a lawful prize of war.

¹⁷⁰ *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128–29 (1814).

¹⁷¹ *Id.*

¹⁷² U.S. CONST. art. I, § 8.

¹⁷³ See CONG. GLOBE, 37th Cong., 2d Sess. 1858 (1862).

¹⁷⁴ *Id.* at 1810.

precisely the power which the English Parliament has over the English army in the field, and no more; and the President, in the command of the Army, and in directing its operations, is, in my humble judgment, just as supreme and as independent of any direction from Congress, or the judiciary, or anybody else, as the King of Great Britain is in the command of the armies of Great Britain.¹⁷⁵

Here Cowan was simply in error; as Hamilton had pointed out in *The Federalist Papers*, the President was not given the same power over warfare as the King of Great Britain.¹⁷⁶

Finally, the opponents of the Confiscation Bill fell back on the same analogical reasoning that Bush Administration officials have employed: that the power to deploy troops on the battlefield leads to the logical conclusion that the entire conduct of the war is within the President's sole power. As Senator Browning put it,

Has Congress anything whatever to do with it [confiscation]? Just as well might Congress claim the right to tell the general on the field of battle when to advance and when to withdraw a column, and when the bayonet should be substituted for the musket and the rifle. These are not legislative functions, but executive. So is the seizure and confiscation of the property of a public enemy on land in time of war executive. It is not the *making*, but the *executing* of a law.¹⁷⁷

Radical proponents of the bill, as well as moderate Republicans who supported compromise, argued forcefully that Congress had virtually absolute power to control the conduct of the war, and that the President's power merely entitled him to act in the absence of legislation. Senator Trumbull argued that

there is not a syllable in the Constitution conferring on the President war powers As Commander-in-Chief when an army is raised, in the absence of any rules adopted by Congress for its government, he would have the right to control it, in the prosecution of the war, according to his discretion, not violating the established rules of civilized warfare¹⁷⁸

For Trumbull, "When armies and navies are raised by Congress, of which the President is, by the Constitution, made Commander-in-Chief, he can only govern and regulate them as Congress shall direct"¹⁷⁹ Senator

¹⁷⁵ *Id.* at 1879.

¹⁷⁶ THE FEDERALIST NO. 74, *supra* note 73, at 500.

¹⁷⁷ CONG. GLOBE, 37th Cong., 2d Sess. 1858 (1862).

¹⁷⁸ CONG. GLOBE, 37th Cong., 2d Sess. 1559 (1862).

¹⁷⁹ *Id.*

Justin Morrill similarly claimed that there is “no limit on the power of Congress; but it is invested with the absolute powers of war,” “the whole power of war,” “an *unrestricted power*.”¹⁸⁰ Senator Charles Sumner responded to Browning that “there is not one of the rights of war which Congress may not invoke. There is not a single weapon in its terrible arsenal which Congress may not grasp.”¹⁸¹ Senator Jacob Howard was even more explicit that Congress had complete control over the conduct of warfare, with the exception that it cannot supersede the President in the chief command:

For if it be the exclusive right of Congress not only to raise and support armies and navies, but (which is an irresistible and immediate inference) to use and employ them for warlike purposes, they must possess also the power to control every movement of the Army and Navy in actual service, whenever they shall see fit so to do. They cannot indeed supersede the President in the chief command, but they possess the undoubted power under the Constitution to subject him to their own orders as to the objects of the war, its extent and duration, the contingencies upon which it shall cease or be resumed, the means of annoyance or defense that may be employed, and, in short, the entire use which he shall make of the military forces of the country.¹⁸²

Moderate Republicans generally agreed with Trumbull, Morrill, Sumner, and Howard. Senator John Sherman, a moderate Republican who introduced an amendment to Trumbull’s bill to narrow its scope, did not agree with the opposition’s view of war powers. For him, the President could conduct the war “only in the manner and in the mode we may prescribe by law.”¹⁸³ “It is the duty of Congress to declare war, to raise armies, to equip navies, to make rules and regulations governing war, and the President has no power except simply, as Commander-in-Chief of the Army and Navy, to execute those laws.”¹⁸⁴ And some members of Congress, such as Representative Frank Blair, argued that congressional power over emancipation or confiscation did not stem primarily from the Capture Clause but was an “incident of the general war power of Congress.”¹⁸⁵

Senator Benjamin Wade answered Browning and Cowan’s argument that Congress could not interfere with the President’s command of battlefield

¹⁸⁰ *Id.* at 1076. *See also id.* at 1875 (Sen. Wilmot).

¹⁸¹ *Id.* at 2918.

¹⁸² *Id.* at 1718. Senator John Hale admitted that there were some express powers of the President, such as the pardon power, with which Congress could not interfere, but rejected the notion that the Commander in Chief power was one of them. *Id.* at 2928.

¹⁸³ CONG. GLOBE, 37th Cong., 2d Sess. 1784 (1862).

¹⁸⁴ *Id.* at 1784.

¹⁸⁵ *Id.* at 2300.

operations, arguing that although it would be foolish for Congress to interfere with the President's power to command in the field, Congress nonetheless had the constitutional authority to do so:

Undoubtedly and unquestionably Congress is not going to interfere with the command of a general in the field before the enemy; they are not going to say to him, you shall march such a brigade to such a place, and you shall countermarch another, and you shall advance and retreat, and you shall intrench, and you shall pull down your intrenchments, you shall assail the enemy to-morrow, and you shall retreat from him the next day. *I do not doubt that Congress, if they were foolish enough, have power even to regulate that; but it would be as foolish as anything could be to attempt such an interference with a general, a commander-in-chief in the field.* Nobody contemplates any such thing; but we may lay down the principles on which the war shall be prosecuted; we may enact a law to-day, if we will, declaring that the Army shall take no prisoners. Of course the greater includes the less.¹⁸⁶

In the end, the argument that Congress had the war power to provide for the confiscation of Confederate property carried the day. Large majorities in the Senate and House of Representatives voted for the Second Confiscation Act, enacted on July 17, 1862.¹⁸⁷ Due process and other constitutional and political objections forced Trumbull and the other radicals to accept a compromise version of the bill that watered down some of the most forceful provisions in Trumbull's original bill. However, the legislation still imposed duties on the President that Cowan, Browning, and others had argued were inconsistent with his power as Commander in Chief. For example, Section 5 required the President "to cause the seizure of all the estate and property, money, stocks, credit and effects" of certain classes of Confederate leaders, while Section 6 required that within sixty days after a public proclamation by the President warning all persons to cease to aid and abet rebellion, it would be "the duty of the President" to seize property of rebels who did not comply. Section 7 required the army to free all fugitive slaves of rebels who took refuge within the lines of the army and all slaves of rebels captured by the army.¹⁸⁸

¹⁸⁶ *Id.* at 2930 (emphasis added).

¹⁸⁷ Second Confiscation Act, ch. 195, 12 Stat. 589 (1862). The vote on the final bill was 28-13 in the Senate and 82-42 in the House. See SIDDALI, *supra* note 160. In the Senate, even some who had argued that Congress had no power to pass legislation in this whole area, such as Senators Cowan and Collamer, voted for the bill.

¹⁸⁸ SIDDALI, *supra* note 160, at 91. Indeed, Lincoln threatened to veto the bill unless Congress made clear—which it eventually did—that the Act would not "work a forfeiture of the real estate of the offender beyond his natural life." CONG. GLOBE, 37th Cong., 2d Sess. 3374 (1862); BOGUE, *supra* note 161, at 234.

The bill was forced upon a reluctant President who had wanted Congress to wait until he recommended these measures.¹⁸⁹ According to Congressman James G. Blaine, Lincoln did not object to the legislation in principle, but thought it was ill-timed and premature, and signed the law reluctantly. Indeed, the bill's opponents challenged Congress's constitutional power to provide for confiscation, in part because they recognized that Lincoln was hesitant to interfere with the rebels' property rights.¹⁹⁰ Lincoln promulgated the proclamation required by the statute but never vigorously enforced the statute, and by the end of the war less than \$2 million in property had been confiscated from the rebels.¹⁹¹ But the principle that Congress could decide whether the government should use confiscation of enemy property as a tactic of warfare had been clearly established.¹⁹²

After the Civil War ended, the Supreme Court upheld the constitutionality of the Confiscation Act, employing broad language that mirrored the Republican arguments that accorded Congress virtually unlimited power to control the conduct of war.¹⁹³ The Court held that the congressional "power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted."¹⁹⁴ The Court therefore agreed with those members of Congress who located congressional power to seize and confiscate the property of an enemy within the general power to declare war. Moreover, the Court claimed that "[i]f there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land and water."¹⁹⁵

¹⁸⁹ I JAMES G. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD 343 (1884).

¹⁹⁰ SIDDALI, *supra* note 160, at 138.

¹⁹¹ SIDDALI, *supra* note 160, at 238–39. While the courts handled a considerable number of confiscation cases under the statute, very little property was actually confiscated under the Act. JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 288–91 (1926). In large part this was due to the compromise nature of the statute, its lack of a strong enforcement mechanism, and Lincoln's reluctance to strongly enforce it. SIDDALI, *supra* note 160, at 245–47.

¹⁹² War Department Solicitor William Whiting affirmed congressional power to order emancipation and confiscation in an important study published in 1863. WILLIAM WHITING, WAR POWERS OF THE PRESIDENT AND THE LEGISLATIVE POWERS OF CONGRESS IN RELATION TO REBELLION, TREASON AND SLAVERY (Boston, John L. Shorey 2d ed. 1862). Whiting took the position that the President and Congress had concurrent power over emancipation and confiscation, writing that "[t]he military authority of the President is not incompatible with the peace or war powers of Congress; *but both co-exist, and may be exercised upon the same subject.*" *Id.* at 68 (emphasis added).

¹⁹³ *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1871).

¹⁹⁴ *Id.* at 305.

¹⁹⁵ *Id.*

D. Twentieth Century

Twentieth century Congresses continued to exercise their authority to limit the President's conduct of authorized hostilities. Congress has regulated in minute detail the manner in which armed forces may be deployed, enacted detailed rules governing the conduct of those forces, set forth rules of engagement, authorized the President to conduct hostilities limited in geographic scope, time, the type and number of forces that could be used, and the objects and purposes for which force could be used.

For example, in 1908, Congress enacted a statute barring any expenditure for the Marine Corps unless Marine Corps officers and enlisted men constituted at least 8% of the enlisted men on board all battleships and armed cruisers.¹⁹⁶ The statute overruled a decision by President Theodore Roosevelt to station Marines on shore and not aboard naval ships. The Navy apparently had doubts as to the constitutionality of the statute and requested an opinion from the Attorney General, George W. Wickersham.¹⁹⁷ Wickersham had "no doubt" as to the constitutionality of the statute.¹⁹⁸ For "Congress is the sole judge of how the Army or Navy shall be raised and of what it shall be composed."¹⁹⁹ Therefore Congress could constitutionally require that no funds shall be available for the Marine Corps, "unless the marine corps be employed in some designated way," and the President was bound to comply.²⁰⁰

In 1913 Attorney General James McReynolds opined that a Navy regulation permitting staff officers of the Marine Corps to be detached from headquarters and given other duties was unlawful because it contravened the relevant statutes.²⁰¹ These statutes regulated the armed forces in great detail, just as the early nineteenth century statutes previously discussed required specific number of officers and sailors to be deployed on different types of naval vessels.²⁰² Yet this legislation clearly fell within congressional power to decide the composition of the armed forces and to enact rules for their deployment.

More importantly, Congress has authorized the President to use force numerous times since World War II subject to limitations on scope, time period, types of force and geographic area. In 1955, Congress authorized the

¹⁹⁶ Act of Mar. 3, 1909, ch. 255, 35 Stat. 753, 773-74.

¹⁹⁷ 27 Op. Att'y Gen. 259 (1909).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 260.

²⁰⁰ *Id.*

²⁰¹ 30 Op. Att'y Gen. 234 (1913). *See also* WORMUTH & FIRMAGE, *supra* note 65, at 96.

²⁰² *See supra* note 148.

President to use force against China but limited that authorization only to "securing and protecting Formosa and the Pescadores against armed attack."²⁰³ While the Gulf of Tonkin Resolution of 1964 provided the President broad authority "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression" in Southeast Asia,²⁰⁴ Congress subsequently limited the President's power to use American forces to fight the war in Indochina. In response to the escalating ground war in Indochina, Congress provided in the Department of the Defense Appropriations Act of 1970 that "none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos or Thailand."²⁰⁵ That prohibition was prefaced by the statement that the restriction was "[i]n line with the expressed intention of the President of the United States." Then Assistant Attorney General William H. Rehnquist wrote that "the proviso was accepted by the Executive."²⁰⁶ Rehnquist's memorandum, written when he was in charge of the Justice Department's Office of Legal Counsel, supports congressional power to limit the scope of the President's power to conduct hostilities. He argued that the notion that Congress "may not delegate a lesser amount of authority to conduct military operations" than that provided by unlimited declared war "is both utterly illogical and unsupported by precedent."²⁰⁷ He recognized that "Congress undoubtedly has the power in certain situations to restrict the President's power as Commander-in-Chief to a narrower scope than it would have had in the absence of legislation."²⁰⁸ Rehnquist strongly suggested that congressional power to control the conduct of war has constitutional limits, particularly "should Congress attempt by detailed instructions as to the use of American forces already in the field to supersede the President as Commander-in-Chief of the armed forces."²⁰⁹ However, he neither attempted to draw a clear line between congressional and presidential authority, nor did he explicitly claim that any such restrictions would be clearly unconstitutional, but merely that they would not be free of constitutional doubt.

²⁰³ J. Res. of Jan. 29, 1955, Pub. L. No. 4, 69 Stat. 7, *cited in* Bradley & Goldsmith, *supra* note 124, at 2047, 2076-77.

²⁰⁴ J. Res. of Aug. 10, 1964, Pub. L. 88-408, 78 Stat. 384.

²⁰⁵ Department of Defense Appropriations Act, 1970, Pub. L. 91-171, § 643, 83 Stat. 469, 487 (1969). This prohibition was continued in subsequent appropriation acts. *See, e.g.*, Department of Defense Appropriations Act, 1972, Pub. L. 92-204, § 742, 85 Stat. 716, 735.

²⁰⁶ Rehnquist Memo, *supra* note 40, at 40; § 643, 83 Stat. at 487.

²⁰⁷ *Id.* at 18.

²⁰⁸ *Id.* at 20.

²⁰⁹ *Id.* at 21.

After U.S. ground forces entered Cambodia in 1970, Congress debated and eventually enacted legislation providing that "none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia."²¹⁰ The President apparently accepted the constitutionality of the restriction of his power to use ground forces in Cambodia.²¹¹

The Cambodian restriction was preceded by a lengthy seven week debate in the Senate over the Cooper-Church Amendment, which would have prohibited retaining U.S. forces in Cambodia at a time when the President still was deploying them there, and would have also prohibited air operations over Cambodia in support of Cambodian forces.²¹² A notable aspect of the debate is that the opposition to the Cooper-Church Amendment on constitutional grounds generally did not rely on the broad Commander in Chief power to direct the conduct of the war, but on the President's power as Commander in Chief to protect the lives of American troops subject to attack or imminent attack, a power seemingly derived from the President's power to repel attacks on American territory and armed forces.²¹³ Senator Robert Byrd successfully introduced language that stated that nothing in the bill was to be deemed to impugn the constitutional power of the President to take action "which may be necessary to protect the lives of U.S. armed forces wherever deployed."²¹⁴ The Cooper-Church amendment was adopted by the Senate, but failed passage in the House and was not therefore enacted into law.²¹⁵

²¹⁰ Special Foreign Assistance Act of 1971, Pub. L. 91-652, § 7a, 84 Stat. 1942, 1943 (1971).

²¹¹ Abner J. Mikva & Joseph R. Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449, 495 (1971). As with the restriction on the use of ground troops in Thailand and Laos, the Cambodian restriction was prefaced with the phrase "[i]n line with the expressed intention of the President of the United States," suggesting that the President was not planning to reintroduce U.S. troops into Cambodia, and had no constitutional objections to the Amendment. Raven-Hansen & Banks, *supra* note 45, at 912.

²¹² S. REP. NO. 91-865, at 9-10 (1970).

²¹³ See, e.g., 116 CONG. REC. 15560, 15561 (1970) (Statement of Sen. Robert Dole). *Id.* 20411 (Remarks of Sen. Byrd re: President's power to respond to imminent danger or emergency situation without time to consult). See generally Mikva & Lundy, *supra* note 211, at 487-95.

²¹⁴ The final text of the Cooper-Church Amendment is reproduced in THE SENATE'S WAR POWERS, DEBATE ON CAMBODIA FROM THE CONGRESSIONAL RECORD 239 (Eugene P. Dvorin ed., 1970) [hereinafter THE SENATE'S WAR POWERS]. See statement of Senator Byrd, *id.* at 190. Also included in the Cooper-Church Amendment as it was eventually voted on was a proviso that nothing contained in the bill shall be deemed to impugn the constitutional power of the Congress including the power to declare war and to make

Congress eventually terminated the Indochina war by cutting off all funding for the President to continue military operations in Indochina. In 1973, Congress provided that "Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia."²¹⁶

In later years, Congress also limited Executive power to conduct duly authorized warfare. Congress authorized the President in 1983 to continue participation by U.S. armed forces in the Multinational Force in Lebanon but limited the time period of such authorization to eighteen months.²¹⁷ In addition, the President's use of armed force in Lebanon was limited to the performance of the functions specified in and subject to the constraints imposed by the agreement establishing the Multinational Force in Lebanon, except that the President could take protective measures necessary for the safety of that force.²¹⁸ Three main limitations on the U.S. role were set forth in that agreement: the number of U.S. troops would be approximately 1,200, they would operate only in the Beirut area, and they were not expected to perform a combat mission except to exercise the right of self-defense.²¹⁹

rules for the government and regulation of the armed forces of the United States. *Id.* Some felt that acceptance of the proviso protecting the constitutional power of the President "'gutted' the entire Cooper-Church effort." Mikva & Lundy, *supra* note 211, at 491.

²¹⁵ See ROBERT DAVID JOHNSON, CONGRESS AND THE COLD WAR 164–68 (2006). Before a compromise was negotiated by the Majority Leader, the Senate had rejected an amendment offered by Senator Byrd which would have provided that Cooper-Church did not preclude the President from taking all actions necessary to protect U.S. troops in South Vietnam. *Id.* at 166.

²¹⁶ H.R.J. Res. 636, 93d Cong. (1973), Pub. L. No. 93-52 § 108, 87 Stat. 130, 134.

²¹⁷ S.J. Res. 159, 98th Cong. (1983), Pub. L. No. 98-119, § 6, 97 Stat. 805, 807.

²¹⁸ *Id.* § 3, 97 Stat. at 806.

²¹⁹ S. REP. NO. 98-242, at 11 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1230, 1240, 1248–49. In signing the legislation, President Reagan claimed that while it was his intention to consult with Congress, he did not consider himself bound to follow congressional directives that limited his war powers, including the 60-day limit of the War Powers Resolution. Statement on Signing S.J. Res. 159 into law, 19 Weekly Comp. Pres. Doc. 1422–23 (Oct. 17, 1983). However, in a letter to House Speaker Thomas P. O'Neill, Jr., President Reagan said that it was his "intention to seek congressional authorization—as contemplated by the Act—if circumstances require any substantial expansion in the number or role of U.S. armed forces in Lebanon." Letter to Congressional Leaders on the Compromise Resolution on War Powers, 19 Weekly Comp. Pres. Doc. 1342 (Sept. 27, 1983) (emphasis added). See generally Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1423–27 (1984) for the background of the Lebanon resolution.

In 1980, the Justice Department's Office of Legal Counsel affirmed congressional power to place time limits on the President's use of troops to conduct hostilities.²²⁰ Assistant Attorney General Harmon wrote that the sixty day limit on the use of U.S. armed forces by the President was constitutional. For Harmon, "[t]he practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad."²²¹ That burden did not unconstitutionally intrude upon the President's executive powers. Perhaps even more importantly, Harmon recognized that "Congress may regulate the President's exercise of his inherent powers by imposing limits *by statute*."²²² This position is consistent with both Rehnquist's memorandum and Chief Justice Marshall's opinion in *Little* that legislation may limit the power the President may have as Commander in Chief.

Similarly, in 1993 Congress authorized President Clinton to use U.S. armed forces in Somalia subject to both time limitations and severe restrictions on their use.²²³ Congress approved the use of U.S. armed forces only for the purpose of protecting U.S. personnel and bases and securing the free flow of supplies and relief operations in Somalia.²²⁴ Moreover, Congress provided a time limit for the President's use of troops until March 31, 1994, after which the President was obligated to return to Congress for further authorization.²²⁵

As already noted, Congress limited the purpose, object, and uses of U.S. armed forces in authorizing the President to take action against Iraq in 1991. Rather than authorizing unlimited warfare against Iraq, Congress permitted the President to use U.S. forces only for the purpose of implementing various Security Council resolutions, thereby precluding certain military tactics and strategies, including those that would have resulted in a military campaign against Baghdad to oust Saddam Hussein.²²⁶

The Congressional debate on whether to authorize President Clinton's air campaign against Yugoslavia in 1999 is also instructive as to the scope of

²²⁰ 4A Op. Off. Legal Counsel 185, 196 (1980).

²²¹ *Id.*

²²² *Id.* Harmon claimed that the War Powers Resolution's use of the legislative veto by concurrent resolution of both houses was unconstitutional, but that Congress could regulate the President's inherent powers by means of a duly enacted statute.

²²³ Department of Defense Appropriation Act, 1994, Pub. L. No. 103-139, § 8151(b)(2)(B), 107 Stat. 1418, 1475-76 (1993).

²²⁴ *Id.* at 1476.

²²⁵ *Id.* Congress also limited the President's power to determine who should command U.S. forces on the ground providing that those forces "shall be under the command and control of United States commanders" and not U.N. commanders. *Id.*

²²⁶ H.R. J. Res. 77, 102d Cong. (1991), Pub. L. No. 102-1, 105 Stat. 3. *See supra* p. 412, note 64.

congressional power to impinge upon the Commander in Chief's choice of military tactics. Clinton had initiated a bombing campaign in conjunction with NATO forces against Serbia in response to Serbian human rights violations in Kosovo without first obtaining congressional authorization. The Senate voted relatively quickly to authorize the President to conduct limited military operations: "military *air* operations and *missile strikes* in cooperation with our NATO allies against the Federal Republic of Yugoslavia."²²⁷ When the House of Representatives debated the Senate Resolution more than a month later, many Representatives believed that they should explicitly deny the President the power to use ground forces in the Yugoslav conflict. Congresspersons Tillie Fowler and William Goodling introduced a resolution to prohibit the use of appropriated funds for the deployment of ground elements of the U.S. armed forces in the Federal Republic of Yugoslavia unless that deployment was specifically authorized by law.²²⁸ The House debated a series of resolutions at the same time, including one to declare war, the Senate resolution authorizing the limited warfare, and the resolution prohibiting the use of ground forces.

Virtually every member of Congress who participated in the debate recognized that Congress had the constitutional authority to limit the use of ground troops even if they authorized the President to conduct warfare.²²⁹ Only a few representatives disputed the constitutionality of the resolution even though it could have been read to prevent U.S. commanders from pre-positioning tanks and military equipment, prohibit on the ground intelligence gathering and the use of special forces, and impair commanders' ability to gather intelligence necessary to prosecute the air war and obtain other critical military information.²³⁰ Despite a few members' concerns that the resolution interfered with the President's commander in chief power by getting "into the details of whether 'you can do this mission, but you can't do that mission,'"²³¹ the House voted 249-180 to approve the prohibition on the use

²²⁷ S. Con. Res. 21, 106th Cong. (1999), 145 CONG. REC. 7785 (1999) (emphasis added).

²²⁸ H.R. Res. 1569, 106th Cong. (1999), 145 CONG. REC. 6, 7743 (1999).

²²⁹ 145 CONG. REC. 7740 (1999) (remarks of Rep. Kolbe that he would vote to authorize limited war, but prohibit the use of ground troops.); *id.* at 7741 (remarks of Rep. Castle to same effect); *id.* at 7733 (remarks of Rep. Markey); *id.* at 7746 (remarks of Rep. Andrews, recognizing that Congress has the constitutional power to tell the President not to use ground troops, but that it is wrong to do so); *id.* at 7751 (remarks of Rep. Spratt, same).

²³⁰ 145 CONG. REC. 7736 (1999) (remarks of Rep. Bentsen setting forth limitation imposed by bill); *id.* at 7729 (remarks of Mr. Spratt) (same); *id.* at 7751 (remarks of Rep. Skelton) (same).

²³¹ 145 CONG. REC. 7787 (1999) (remarks of Rep. Sisisky); *id.* at 7744 (remarks of Rep. King).

of ground elements in the military campaign.²³² While the Senate Resolution was ultimately defeated in the House by a tie vote of 213-213, and therefore neither that resolution nor the resolution prohibiting the introduction of ground elements ever became law, Congress overwhelmingly agreed that it had the authority to limit the manner and means by which the President can conduct ongoing military campaigns.

Congress also can and has enacted statutes implementing various laws of war treaties which regulate the tactics the President can deploy on the battlefield.²³³ For example, the War Crimes Act prohibits and makes criminal grave breaches of the Geneva Convention as well as various articles of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land of 1907.²³⁴ The Act prohibits and criminalizes any attack on towns, villages, dwellings, or buildings that are undefended; the use of weapons calculated to cause unnecessary suffering; and the destruction or seizure of enemy property unless such destruction is imperatively demanded by the necessities of war, and requires the Executive to take all necessary steps to spare buildings dedicated to religious and certain other civilian uses in any siege or bombardment. In addition, the statute prohibits the military from using weapons such as mines and booby traps in a manner contrary to the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to kill or seriously injure civilians when the United States ratifies that treaty.²³⁵ Thus, in sum, Congress has exercised its power to implement treaties governing the rules of war and to define offenses against the law of nations, which restricts military commanders' discretion to conduct warfare.²³⁶

²³² 145 CONG. REC. 7756 (1999). Many members of Congress who voted to authorize limited war also voted for the resolution prohibiting the introduction of ground troops.

²³³ War Crimes Act, Pub. L. No. 104-192, § 2(a) (1996) (codified at 18 U.S.C. § 2441 (2000)).

²³⁴ 18 U.S.C. § 2441(c)(2) (2000) (codifying Arts. 23, 25, 27, 28, Convention IV Respecting the Laws and Customs of War on Land, with Annexed Regulations, Oct. 18, 1907, 36 Stat. 227).

²³⁵ 18 U.S.C. § 2441(c)(4) (2000).

²³⁶ Professor John Yoo argues that the "treatment of captured enemy soldiers" is an area in which the President enjoys exclusive authority, yet dismisses the statutes that Congress has enacted regulating the treatment of enemy soldiers throughout American history. John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1201 (2004). He discusses statutes criminalizing torture of enemy prisoners and nowhere disputes their constitutionality, although he fails to recognize that such statutes clearly regulate the "treatment of captured enemy soldiers," and therefore under Yoo's analysis should be unconstitutional as an infringement of the President's exclusive authority over the treatment of captured enemy soldiers. *Id.* at 1232-33. He claims that the congressional power to "make Rules for the Government and Regulation of the land and naval Forces"

In sum, recent history confirms the lessons set forth by the early leaders of the Republic. As the Supreme Court recognized early on, Congress can control the President's conduct of war by limiting his authorization "in place, objects and in time." Congress has done so throughout our history.

III. CONCURRENT POWER OVER THE CONDUCT OF WAR

The history of congressional restrictions on the President's Commander in Chief power to fight wars confirms that the Constitution grants Congress substantial power to decide not only whether to initiate warfare, but how and in what manner those authorized wars should be fought. But the Constitution also accords the President substantial authority over the conduct of warfare. Certain powers were designed to be exclusive to Congress or the President. Only Congress can authorize and initiate warfare, with the sole exception that the President can use force to respond to sudden attacks. Only Congress can appropriate monies for the armed forces. The President was given the exclusive power to command the armies. But for the most part, Congress and the President were given concurrent powers over the conduct of warfare.

A. *Defining and Understanding Concurrent Power*

The concept of concurrent power in the area of foreign policy and war-making has not been extensively analyzed, and confusion about it is abundant. One reason for the confusion stems from Justice Jackson's well-known *Youngstown* concurrence in which he set forth three broad situations in which a President's power may be challenged: (1) "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum"; (2) "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain"; and (3) "When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb."²³⁷ The confusion stems from Jackson's grouping of the concept of concurrent authority together with areas in which the distribution of power is uncertain, in his middle category, the "zone of twilight."²³⁸

is likely limited to the discipline of U.S. troops, despite the lack of any textual reason to so read that power and despite the fact that the early statutes enacted by Congress explicitly addressed soldiers' treatment and detention of civilians and enemy soldiers. *Id.* at 1202; *see supra* notes 148–49.

²³⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 637 (1952).

²³⁸ *Id.* at 637.

Justice Jackson's groupings have led to two conceptual fallacies. The first is associating concurrent power with Jackson's second, middle tier.²³⁹ This association is inaccurate, because Jackson's three tiers refer to the relationship between congressional and executive *action* and not the respective *powers* of the branches.²⁴⁰ Concurrent powers exist in all three of Justice Jackson's categories. The President may act in conformity with congressional will though he or she may possess concurrent power to act stemming from the Constitution rather than statute. A court will undoubtedly not reach that constitutional question once it finds that the President has statutory power to act.²⁴¹ So too, the President may have concurrent power over a particular area, but acts unconstitutionally if the President's activities conflict with the implied or express will of Congress.

The second, and more important, fallacy grew from lawyers and scholars lumping together concepts of concurrent authority and uncertain authority, which are distinct categories requiring different analysis. Where the distribution of power is uncertain, one must analyze its proper distribution. This involves a complex, often murky, case-specific analysis. Such an analysis entails either line drawing by separating the branches' respective authorities, or balancing the branches' functions to determine whether a statute impermissibly interferes with Executive authority. However, when the two branches have concurrent power, the distribution of power is not uncertain. The sole question is that of determining congressional will.

The Department of Justice confuses and intermingles these two concepts—concurrent power and powers of uncertain distribution—in its memorandum “Legal Authorities Supporting the Activities of the National Security Agency Described by the President.”²⁴² That memorandum claims that absent AUMF authorization, the struggle against al Qaeda would fall into “what Justice Jackson called ‘a zone of twilight,’ in which the President and the Congress may have concurrent powers whose ‘distribution is uncertain.’”²⁴³

The Department of Justice's reliance on Justice Jackson's teaching is faulty because Jackson did not refer to concurrent power whose distribution is uncertain. Rather, he stated there is a zone of twilight in which the President and Congress “may have concurrent authority,” or “in which the

²³⁹ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 386 (1989) (“[W]e have recognized the constitutionality of a ‘twilight area’ in which the activities of the separate branches merge.”).

²⁴⁰ See MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 15–16 (1990) (explaining that usage of the term *concurrent power* to refer to Jackson's middle tier, the zone of twilight, is inaccurate).

²⁴¹ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–17 (2004).

²⁴² *LEGAL AUTHORITIES*, *supra* note 3.

²⁴³ *Id.* at 11.

distribution of power is uncertain.”²⁴⁴ The Justice Department’s memorandum suggests that even if Congress has *concurrent* power to regulate intelligence gathering activities, one still must determine whether an exercise of this congressional power impermissibly interferes with the Executive’s authority. Justice Jackson said no such thing.

Perhaps the confusion can be attributed to giving different meanings to the words “concurrent power.” One could define the term loosely to mean simply that Congress and the President have some power within the same area. For example, one could say that Congress and the President have “concurrent war powers,” and mean that each branch was given some war powers—Congress to declare war, the President to be Commander in Chief—and that the distribution of these powers is uncertain.

That interpretation is not, however, the best reading of Justice Jackson’s admittedly opaque usage of the term *concurrent*, and it is not the definition I use here. The definition of *concurrent* used here is that both branches have the power to act upon the same subject. This definition is not only more usable as a legal concept than the loose characterization of *concurrent* as meaning that both branches have power in related, broad areas, but it is also consistent with the common and accepted meaning of the word “concurrent.”²⁴⁵

Yet another source of confusion is the intermingling of the terms “independent power,” “inherent power,” “exclusive power,” and “core power,” particularly when discussing foreign affairs power.²⁴⁶ The President’s independent Commander in Chief power is often conflated with an exclusive power or inherent, indefeasible power. To say that the President has independent power stemming from the Constitution does not mean he has exclusive authority. Rather it simply means that he has constitutional authority to act in the absence of implied or express congressional authorization. That does not tell us, however, whether Congress also has independent power to act in this same area. Only where the President has the exclusive power to act is Congress precluded from acting upon the same subject matter. Where the two branches have concurrent power, it means that they both have independent, but not exclusive, power to act upon the subject area. But in a case of conflict the rule would seem clear. Where Congress has the concurrent power to act, the President cannot act in opposition to the law Congress enacts, irrespective of whether he also has the independent

²⁴⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

²⁴⁵ WEBSTER’S INTERNATIONAL DICTIONARY (3d ed. 2002) defines concurrent as “taking cognizance of or having authority over the same subject matters.”

²⁴⁶ *Youngstown*, 343 U.S. at 646–47. Justice Jackson noted that “[i]nherent powers, ‘implied’ powers, ‘incidental’ powers, ‘plenary’ powers, ‘war’ powers and ‘emergency’ powers are used, often interchangeably and without fixed or ascertainable meanings.” *Id.* at 647.

authority to act.²⁴⁷ For the President must obey and enforce duly enacted laws, and where the President and Congress have concurrent power to take certain actions, Congress must have primacy in case of conflict.²⁴⁸ Indeed, that is the express meaning of Justice Jackson's third category in *Youngstown*; when

the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.²⁴⁹

Where Congress is not so disabled it must have either the exclusive power to act or concurrent authority to act. Only if Congress has no authority to act can the President prevail.

For example, the Justice Department conflates the notion of independent power and exclusive power in arguing that the Foreign Intelligence Surveillance Act (FISA) would be unconstitutional if read to prohibit the National Security Agency's (NSA) warrantless wiretapping program. The Department of Justice argues that the President has *inherent* constitutional

²⁴⁷ Professor Henkin's well-known treatise on foreign affairs and the Constitution refers to concurrent powers in a manner that must be different than that set forth here. Professor Henkin writes that

Justice Jackson did not tell us, or offer a principle that might help us determine, which powers are concurrent. Nor does the Jackson 'arithmetic' suggest which branch prevails in case of conflict between them. The area of concurrent power seems to involve principally Presidential pretensions where Congressional authority is clear, which might suggest that Congress should usually prevail in case of conflict, no matter which branch acted first.

LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 95 (2d ed. 1996). My definition of concurrent power postulates that both branches have legitimate authority over the same area, and therefore, under Jackson's formulation in *Youngstown*, Congress should *always* prevail when there is a conflict.

²⁴⁸ Professor Mark Rosen has recently questioned what he terms Justice Jackson's "categorical congressional supremacy" assumption. Rosen, *supra* note 55. Jackson, of course, did not state that presidential acts in violation of a statute are always unconstitutional, but recognizes that such acts may be constitutional if Congress has no power to act over a certain subject. For example, the President would not have to comply with a statute requiring that the Speaker of the House of Representatives be appointed Commander in Chief of the armed forces. But where Congress *does* have concurrent power over a subject area, the constitutional text and basic separation of powers principle that the President enforce the law strongly supports congressional supremacy where the presidential acts conflict with a statute.

²⁴⁹ *Youngstown*, 343 U.S. at 637-38.

authority to conduct warrantless searches as part of his “duty to protect the Nation from armed attack.” However, most of the precedents it cites stand simply for the proposition that the President has some independent authority to engage in warrantless wiretapping for national security purposes. They do not hold that he has exclusive authority to do so irrespective of legislation forbidding such conduct.²⁵⁰

The only judicial decision the Justice Department cites that arguably supports the claim that the President has an exclusive power to conduct war is *In re Sealed Case*; yet, that decision also muddled and misused the term inherent power.²⁵¹ In *In re Sealed Case*, the Foreign Intelligence Surveillance Court of Review asserted that the Fourth Circuit’s decision in *United States v. Truong Dinh Hung* “held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President’s constitutional power.”²⁵² The Fourth Circuit in *Truong* simply held that the President had independent constitutional authority to conduct foreign intelligence wiretapping. However, the *Truong* court explicitly disclaimed that the President had exclusive authority to preclude legislation requiring warrants. The Court stated that the

imposition of a warrant requirement, beyond the constitutional minimum . . . should be left to the intricate balancing performed in the course of the legislative process by Congress and the President. The elaborate structure of the statute [the FISA, which had been enacted subsequent to the surveillance involved in that case] demonstrates that the political branches need great flexibility to . . . formulate the standards which will govern foreign intelligence surveillance.²⁵³

Simply because the President has some independent power to engage in foreign intelligence surveillance that does not depend on legislation does not mean that he has sole or exclusive power to do so. As the Fourth Circuit recognized in *Truong*, Congress also has constitutional authority to regulate intelligence gathering in time of war. As the Court noted in *Hamdan*, whatever “independent power” the President may have does not allow him to “disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”²⁵⁴

²⁵⁰ LEGAL AUTHORITIES, *supra* note 3, at 9; *see generally id.* at 7–10.

²⁵¹ LEGAL AUTHORITIES, *supra* note 3, at 8 (quoting *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002)).

²⁵² *In re Sealed Case*, 310 F.3d at 742.

²⁵³ *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 n.4 (4th Cir. 1980).

²⁵⁴ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006).

The President's Article II independent power as Commander in Chief to conduct warfare that is authorized by Congress has three relevant components. The first is his or her power to control the conduct of military campaigns in a duly authorized war. In the absence of any directive or limitation from Congress, the President and his subordinates must decide the tactics and strategies used to conduct military campaigns, subject to constitutional or international law limitations.²⁵⁵

Second, the President was given, in Hamilton's words, "a right to command the military and naval forces of the nation."²⁵⁶ The President or her subordinates must actually give orders to the military during warfare. Though Congress may decide that the President shall implement certain policies during a war, it falls to the Executive to give orders carrying out those policies. Congress does not send orders to the front, even general orders directing commanders to seize or treat prisoners in a specified manner. That is an Executive function. The second aspect of the power to command is the President's control over his or her commanders. Congress cannot take command itself, cannot appoint nor remove the general in charge of a particular war or particular command; that task falls to the President, subject to restraints imposed by the Constitution and Congress.²⁵⁷

Finally, the President has the power as Commander in Chief to repel sudden attacks.²⁵⁸ That power provides the President with the authority in peacetime to respond to attacks upon U.S. troops, citizens, or territory.²⁵⁹ That authority has been the subject of much controversy over the last half of the twentieth century, as Presidents and their supporters read their power to repel attacks as a broad mandate to defend U.S. national security wherever in the world it was threatened.²⁶⁰ While the debate over the Commander in

²⁵⁵ For example, the President's Commander in Chief power to conduct warfare may in certain circumstances be restricted by the Bill of Rights, or by treaties of the United States, and is also limited by international law. See Lobel, *supra* note 168, and sources cited *infra* note 297.

²⁵⁶ THE FEDERALIST NO. 69, *supra* note 9, at 470.

²⁵⁷ For example, the Appointments Clause of the Constitution provides that the President's appointment of all officers of the army and navy is subject to confirmation by the Senate, unless otherwise provided by law. U.S. CONST. art. II, § 2, cl. 2.

²⁵⁸ See *supra* notes 73-74 and accompanying text.

²⁵⁹ For example, Section 2 of the War Powers Resolution defined the Commander in Chief's power to repel attacks as arising only "by attack upon the United States, its territories or possessions, or its armed forces." Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541(c)(3)).

²⁶⁰ During the Vietnam War, the Executive branch argued that the President had the unilateral power to send troops to Vietnam because in the modern context warfare anywhere in the world might "impinge directly on the nation's security." Dep't of State, Office of the Legal Adviser, *The Legality of United States Participation in the Defense of Viet Nam*, 75 YALE L.J. 1085, 1101 (1965). For the contrary position that the Constitution

Chief's repel sudden attack power has focused on the President's constitutional authority to initiate warfare, the "repel attack" analysis also has implications for the President's ability to conduct wars authorized by Congress. As the congressional debate on the Cooper-Church Amendment in 1970 illustrates, once the President is conducting warfare, she has authority to decide what tactics are to be used to protect troops already in the war zone from enemy attacks.²⁶¹

These are the *independent* powers of the President as Commander in Chief to conduct warfare authorized by Congress. However, only the second power, the right to command, is an *exclusive* presidential power.

B. Concurrent Powers and Alternative Frameworks

This Article's conclusion that Congress and the President have concurrent power over the conduct of authorized warfare is echoed in a recent two-part article by Professors David Barron and Martin S. Lederman on the Commander in Chief power, which similarly concludes that the President does not have an exclusive substantive power over the conduct of military campaigns and warfare that Congress may not regulate.²⁶² While the two articles' conclusions are similar, their methodological framework somewhat differs. Barron and Lederman propound a core/periphery dichotomy which analyzes whether the President's Commander in Chief power to conduct military campaigns is a core, preclusive power of the Executive branch, or rather a peripheral power which could be regulated by Congress. To Barron and Lederman the "key constitutional question, therefore, is which, if any, of the President's constitutional war powers are so central to his performance of his role as the Commander in Chief as to preclude Congress from regulating them."²⁶³

In contrast, this Article focuses on the concept of concurrent power, and asks not whether the Executive power at issue is central or peripheral, but the related, yet analytically distinct, question of whether Congress and the President have overlapping power in a particular area. That inquiry stems

only accords the President a narrow power to defend the country from attack, see S. REP. NO. 220 at 10–14 (1973); FISHER, *supra* note 20; Adler, *supra* note 20.

²⁶¹ In the debate over including a proviso recognizing the President's power to protect the Armed Forces of the United States, Senator John Cooper pointed out that the powers being discussed "are essentially defensive to repel attack, sudden and impending" Remarks of Sen. John Cooper on the Second Byrd Amendment, *reprinted* in EUGENE DVORIN, THE SENATOR WAR POWERS: DEBATE ON CAMBODIA FROM THE CONGRESSIONAL RECORD 186 (1970).

²⁶² Barron & Lederman, *Framing the Problem*, *supra* note 19; Barron & Lederman, *A Constitutional History*, *supra* note 19.

²⁶³ *Id.* at 1099.

directly from the metaphor Justice Jackson used to analyze conflicts between Presidential action and legislative will in which the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."²⁶⁴ Under Jackson's *Youngstown* approach, the President's power fluctuates based on whether Congress has independent, overlapping, concurrent power over the matter. If Congress does, then that power negates whatever independent power the President may have in case of a conflict.²⁶⁵ Only where Congress does not have concurrent power can the President's independent constitutional authority trump or override a conflicting statute.

Of course, the concurrent/sole power framework suggested here shares an important feature with the Barron/Lederman core/periphery approach, in that both require a determination of whether the particular Commander in Chief power the President asserts is not merely an independent constitutional power, but is preclusive. The core/periphery inquiry, however, has several troubling features. First, the core/periphery terminology adds another set of confusing concepts in an area which, as Jackson pointed out in *Youngstown*, is already littered with a dizzying array of vague and ambiguous terms. The question of whether any power is "so central" to the President's performance of his role as Commander in Chief introduces into the war powers context the much criticized formulation the Supreme Court utilized in *Morrison v. Olsen*.²⁶⁶ Terms like "core" or "so central" add nothing to our understanding of whether a Presidential power is in fact preclusive or not.

Second, and more importantly, the terms core and periphery are misleading and do not capture or define the division between those areas of Executive authority which are regulable by Congress and those that are not. The core/periphery framework inappropriately conflates centrality with exclusivity.²⁶⁷ For a power might be a core or central (and those terms seem

²⁶⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

²⁶⁵ See, e.g., Rosen, *supra* note 55, at 1706-07, 1714 n.33 (asserting that the common assumption is that Congress trumps when, pursuant to its constitutional powers, it regulates on matters that also fall within the President's Commander in Chief powers).

²⁶⁶ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 695-96 (3d ed. 1999) (claiming that *Morrison* has drawn severe and widespread criticism and quoting Justice Scalia's dissent that the "so central" test is "not analysis; it is ad hoc judgment"); Stephen L. Carter, *The Supreme Court, 1987 Term: Comment: The Independent Counsel Mess*, 102 HARV. L. REV. 105, 132 (1988) ("This particular balancing test, moreover, seems particularly shaky. The Court offers no standards for deciding how much intrusion is too much . . .").

²⁶⁷ WEBSTER'S INTERNATIONAL DICTIONARY 506 (3d ed. 2002) (defining "core" as either "the central or often foundational part of a body," or perhaps more relevantly in this context, "the part [as of an individual, a class, an entity] that is basic, essential, vital or enduring as distinct from the incidental or transient")

to be used interchangeably by Barron and Lederman) Executive authority in the sense that the power might be important, vital, critical, or even essential to the Executive and not peripheral or incidental, but nevertheless still be regulable by the legislature because Congress was given an equally core or central power to provide a check on Executive action. Conversely, a President's power, such as the pardon power, may be exclusive and nonregulable by Congress as a structural and textual matter even if it were not deemed central to the functioning of the Executive branch.²⁶⁸

The Commander in Chief's power to conduct or direct military campaigns is precisely an authority which should be viewed as an important, yet not exclusive, Presidential power. The function of deciding on military tactics and strategy is central and not peripheral to a commander's wartime role. Yet, as Part II demonstrates, Congress was given its own "core" war powers precisely to check the Commander in Chief's important and independent power to conduct warfare that Congress has authorized. "Core," "central," and "peripheral" thus have the potential to mislead because those terms seem to focus on importance, an analytically different concept than exclusive.

The terms "concurrent power" and "sole power" capture the different kinds of authority more accurately than the terms "core," "central," or "periphery." Where both Congress and the President have concurrent authority to regulate, the President cannot disregard the legislative will irrespective of whether the power Congress is regulating might be seen as central to the President's functions. At the opposite end of the spectrum, where the President has sole or preclusive power to act, Congress is, in Jackson's words, "disabled" from acting.

Third, and perhaps most important, to focus the separation of powers inquiry on whether a power is so central to the President's Commander in Chief power frames the inquiry from an exclusively executive perspective. One could equally ask whether the congressional legislation is based on a power provided to Congress explicitly in the Constitution or one central to the Congress's legislative power.²⁶⁹ From that perspective, the congressional powers to declare war, issue letters of marque and reprisal, regulate army and navy, make rules for captures at land and sea, and to raise armies, certainly are explicit, "core" congressional powers that define and limit Executive

²⁶⁸ See *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 485–87 (1989) (Kennedy, J., concurring) (arguing that it is improper to determine level of importance or centrality if text of the Constitution gives an exclusive power to the President).

²⁶⁹ See, e.g., Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 933, 962–63 (2007) ("Where Congress is acting pursuant to a direct textual grant of authority, to conclude that the President may nevertheless disable Congress from regulating his conduct is to subvert the most fundamental structural principles of constitutional law.").

power to wage warfare.²⁷⁰ Indeed, once one starts from the framework of congressional authority, one could logically conclude that Congress can control virtually everything, including most Presidential powers thought to be exclusive.²⁷¹ One need not, however, take that position (and this Article does not—for the President's pardon and veto authority and position as Commander in Chief of the armed forces are exclusive²⁷²) to recognize that congressional powers are quite broad and encompass many, if not most, of the textual powers granted to the President. The proper framework for determining whether the President has exclusive power over a certain subject matter is not whether the asserted authority "is central to the performance of his role," or whether it is a core or peripheral power, but rather whether this is an area that Congress does and should have authority over. That is the thrust of Jackson's important insight that the President's power in case of

²⁷⁰ To the extent that Justice Kennedy's concurring opinion in *Public Citizen*, 491 U.S. at 467, 482–89 (Kennedy, J., concurring) (1989), is read to support the position that Congress cannot constitutionally regulate an explicit Presidential power granted by the Constitution, the opinion is clearly in error. There are many areas of authority—such as the conduct of warfare—where the Constitution's text explicitly grants *both* Congress and the President authority to act. Justice Kennedy's opinion does not contemplate such textually based concurrent power. He only directly addresses two types of conflicts between Congress and the President. In his first example, the President's assertion of power is based merely on the general grant to the President of the "executive power," in which case the Court uses a "balancing approach"; in his second grouping of cases, the "explicit text commits the power at issue to the exclusive control of the President," in which case any congressional interference is intolerable. *Id.* at 484–85. Barron and Lederman and some other commentators read Kennedy to preclude statutory interference with any independent, enumerated Article II power. Barron & Lederman, *supra* note 19, at 741 n.164. However, Kennedy always conditions his analysis on his reading of the textual provision as committing the power at issue to the "exclusive" or "sole" control of the President. His opinion could thus be read as erroneously conflating independent textual power with exclusive power, or more narrowly concluding (erroneously) that the appointment power is exclusive and cannot be regulated. *Id.* at 729. But, most importantly, Kennedy simply does not contemplate a clash of congressional and executive authority where both branches base their asserted authority on the Constitution's explicit text, a clash that exists in the area of controlling the conduct of warfare and military campaigns.

²⁷¹ Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 14–16 (1974).

²⁷² Even with respect to Commander in Chief and veto power, Congress has the theoretical ability to completely negate Presidential authority. There is no dispute that Congress could, if it wanted, virtually eliminate the President's Commander in Chief authority by refusing to provide for an army for him to command and provide rules for the mobilization of state militias which only permitted those militias to be called into service when the United States itself was invaded. So, too, as Professor Charles Black observed, even the President's veto power could be negated if Congress adopted a rule of automatically voting to override all vetoes. Black, *supra* note 271, at 15–16.

conflict with Congress can only be supported “by any remainder of executive power *after* subtraction of such powers as Congress may have over the subject.”²⁷³

The determination of whether Congress and the President have concurrent power over a particular subject area requires answering several questions. First, does the text of the Constitution indicate that both Congress and the President were to have concurrent authority in that area? Second, does according Congress authority over a particular subject matter fulfill a functional need to check the accumulation of excessive authority in the Executive?²⁷⁴ Third, are there other strong structural reasons that power over a specific area should not be divided by drawing subject matter lines but by some other practical principle?²⁷⁵ Finally, does the history of the drafting and ratification of the Constitution, as well as the subsequent history of its implementation over the past two centuries, indicate that this is an area where the two branches share concurrent power?

As this Article has demonstrated, answers to those questions strongly support congressional concurrent power over the conduct of warfare and military campaigns. As the Framers wisely recognized, wartime poses a substantial danger of executive aggrandizement of power, requiring that the legislature be accorded substantial authority to check that potential threat. The text of the Constitution therefore explicitly grants Congress broad authority not only over the initiation of warfare, but also over the regulation

²⁷³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (emphasis added). The Court’s formulation in *Hamdan* that “[the President] may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers,” *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006), follows Jackson as articulating the question as whether Congress has power of the subject. As Barron and Lederman point out, the Court conditions congressional exercise of power with the word “proper,” but the question of whether Congress’ exercise of power has been proper cannot be reduced to the question of whether the area Congress is regulating is central to the President’s role. Moreover, as Professor Mark Cohen points out, if the footnote is read the way Barron and Lederman read it, the Court’s footnote in *Hamdan* only tautologically recites that Congress trumps when it properly trumps. Cohen, *supra* note 55, at 1714 n.33.

²⁷⁴ See *Mistretta v. United States*, 488 U.S. 361, 380–81 (1989) (describing checks and balances as a motivating principle of separation of powers).

²⁷⁵ *Loving v. United States*, 517 U.S. 748, 760, 772 (1996) (Congress was not granted an exclusive power to determine military punishments because the necessity of balancing efficient military discipline, popular control of a standing army and the rights of soldiers led the Framers to perceive the risks “inherent in assigning the task to one part of the government to the exclusion of another.” Congressional power to promulgate rules and regulations is therefore shared with the President whose duties as Commander in Chief “require him to take responsible and continuing action to superintend the military . . .”).

of the armed forces, the rules for capturing the enemy, and the raising and supporting of armed forces.

Moreover, Professor Charles Black's general insight into the working balance of American government applies with even greater force to the specific interaction between Congress's war powers and the President's Commander in Chief power during wartime. Black noted that the fundamental working balance of our government is achieved by the Constitution's textual grant of most formal power to Congress, the branch of government structurally unsuited to exercise power, while the President is clothed with little exclusive textual power but is ideally structured for the exercise of initiative and vigor in administration.²⁷⁶ So long as the President recognizes that Congress has broad textual power and Congress exercises that power sufficiently to provide a check on Executive adventurism, the Executive's practical exercise of substantial power provides a working balance in government. That the Presidency is structured to provide the initiative and energy to prosecute a war authorized by Congress is therefore balanced with a Congress which is unsuited structurally to exercise wartime decision-making but is nonetheless accorded broad textual power to check and limit the President's conduct of war if it chooses to do so.

In addition, there are strong structural reasons for not dividing congressional and presidential power over the conduct of warfare by means of drawing subject area lines, but rather by a more practical division of power which recognizes that timing and initiative is the more effective organizer of power in this area. Third, the text of the Constitution clearly supports the two branches' concurrent, overlapping authority over the conduct of warfare. Finally, as Part II has demonstrated, the history of the drafting, ratification and subsequent two-century practice of the political branches in conducting warfare demonstrates that this is an area where both branches have shared concurrent power to determine the strategy and tactics that the United States utilizes when it engages in armed conflict.

C. Drawing the Lessons of History

Congress's broad concurrent power with the President over the conduct of warfare is demonstrated by the history recounted in Part II. Congress and the Supreme Court have read the Article I Declare War and Letter of Marque and Reprisal Clauses to permit Congress to authorize unlimited war or a limited, partial war in which the President's powers as Commander in Chief are restricted by the terms of the authorization. As that Part demonstrated, Congress can and has limited the forces the President can deploy, permitting only the use of naval forces or only an air war. Therefore, it could also

²⁷⁶ Black, *supra* note 271, at 17-18.

authorize warfare but permit the President to use only airpower, only conventional weapons, or only a certain number of army divisions and no more.

Congress has used its war authorization power to define and limit the objects and purposes for which warfare may be waged in ways that substantially restrict the President's tactical flexibility. The historical record abounds with examples of such wartime limitations. Congress limited its first authorization to use force against France in 1798 to taking reprisals against French ships that had attacked our ships; it limited the 1991 Gulf War authorization to kicking Iraq out of Kuwait and not removing the Iraqi regime; it limited the objects and purposes of the use of force in both Lebanon and Somalia to substantially restrict the tactics and forces the President could deploy.²⁷⁷

Congress has also restricted the time period and duration of its authorization of force. The War Powers Resolution is an example of a general limitation; the authorizations of the Somalia and Lebanon troop deployments are more particular limitations. In those latter authorizations, Congress has in essence promulgated rules of deployment by severely restricting how the President could use the force deployed.

Congress has normally imposed these restrictions in its initial authorization, but there is no logical, textual, nor historical reason to limit congressional power to the onset of warfare. Congress can, of course, withdraw its authorization totally and enact another authorization which provides the President with more limited authority to conduct warfare. Congress could also simply amend the original authorization by providing an express limitation on the President's authority to conduct a war, which Congress essentially did when it restricted funding for the introduction of ground troops into Laos and Thailand in 1970. In short, the power to authorize limited war, not full scale warfare, does not terminate at the beginning of hostilities, but is a continuing option that is within Congress's power.

Congress has also relied extensively on its other war powers to limit the Commander in Chief's discretion in prosecuting a war. It has used its power to make rules for the government and regulation of land and naval forces to enact articles of war governing the permissible conduct of soldiers during wartime and peacetime. It has employed its power to make rules concerning captures on land and water to determine which enemy or merchant ships the military can capture in wartime and which it cannot, which enemy property shall be seized and confiscated and which shall not, and how prisoners of war will be detained and treated. Congress has relied on its power to define and punish offenses against the law of nations to provide that certain military

²⁷⁷ See generally *supra* Part II, pp. 415–45.

tactics shall be impermissible war crimes, such as the bombing of undefended towns. Congress has invoked its power to grant letters of marque and reprisal, not only to initiate hostilities short of declared war, but also to authorize the President to employ privateers for limited purposes and with limited instructions against the enemy. It has relied on its power to raise and support armies and to provide and maintain a navy to issue detailed instructions to the President as to which and how many soldiers and sailors will serve on naval vessels and to impose restrictions on how the President may use the army in conducting warfare. And Congress has the power under the Necessary and Proper Clause to enact any law that is useful or convenient to execute any of its specifically mentioned powers under the broad reading of that Clause set forth by the Supreme Court.²⁷⁸

Some have argued that the historical record supports not only rejecting any Presidential claim of preclusive Commander in Chief wartime authority, but also denying the President independent substantive constitutional power to conduct warfare that is authorized by Congress.²⁷⁹ This reading of history would not find any Presidential power to conduct war grounded in an independent constitutional authority as Commander in Chief, but would derive such presidential power exclusively from statutes authorizing warfare. The extent of presidential power to conduct warfare would, according to this perspective, be determined solely by legislation authorizing warfare.

The historical record contains some support for this perspective. The Framers' intent in naming the President Commander in Chief was clearly to provide for civilian control of the military and to ensure that one person, and not an unwieldy legislative body or someone appointed by Congress, would direct, order, and supervise the military. That intent is not inconsistent with viewing the President's substantive power to conduct warfare as stemming from, and not independent of, legislative enactment. The history of the Commander in Chief's powers under British law also suggests that her powers came from the statute and not the Constitution itself. That all of our declarations of war provide the President with the authority to use the entire army and navy to fight the enemy suggests that the declaration of war itself might not have sufficed to invoke the President's Commander in Chief power.²⁸⁰

Statements by various Republican Senators during the Civil War debate on the Confiscation Act that there is "not a syllable in the Constitution conferring on the President war powers," and that the President can conduct war "only in the manner and in the mode" prescribed by Congress, also support a position that the Commander in Chief Clause accorded the

²⁷⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

²⁷⁹ See Adler, *supra* note 20, at 526.

²⁸⁰ Bradley & Goldsmith, *supra* note 124, at 2063–64.

President only a command function, but no independent substantive power.²⁸¹ So too, Chief Justice Marshall's statement in *Talbot v. Seeman* that the whole powers of war are vested in Congress and that, therefore, "the acts of that body can *alone* be resorted to as our guides"²⁸² in determining whether a capture was lawful also suggests that the extent of the President's power as Commander in Chief is determined solely by legislative authorization. Furthermore, in *Brown v. United States*, Marshall suggested that neither a declaration of war nor a broad authorization of force activate a Commander in Chief's power to execute the laws of war.²⁸³

The *Brown* Court recognized that a declaration of war gave the United States the rights which war confers, but argued that it did not automatically empower the Executive to implement such war measures. Marshall held that the congressional power to make rules concerning captures on land and water was an independent substantive power, not included in the declaration of war. Therefore, the declaration did not authorize the President to seize enemy property in the United States. Indeed, Marshall notes that Congress's independent authorization for the detention of enemy aliens, and for "the *safe keeping and accommodation of prisoners of war*," "authorizations that were separate from its declaration of war, affords a strong implication that [the President] did not possess those powers by virtue of the declaration of war."²⁸⁴

Nonetheless, both text and history strongly suggest that the President as Commander in Chief is accorded nonpreclusive but independent constitutional authority to conduct war once Congress has authorized warfare. That seems to be the best reading of the Constitutional Convention's change in the text of Congress's Article I powers from "make" to "declare" war. As the history of that amendment suggests, one purpose of the change in language was to accord the President at least some independent power to conduct wars once they were authorized. Moreover, the Supreme Court has on various occasions recognized that the President has some independent constitutional power over the military in the absence of legislation to the contrary,²⁸⁵ and judicial precedent and executive practice subsequent to the

²⁸¹ See statements of Sens. Lyman Trumbull and John Sherman quoted *supra*, pp. 435–36.

²⁸² 5 U.S. (1 Cranch) 1, 28 (1801).

²⁸³ *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814).

²⁸⁴ *Id.* at 126 (emphasis added).

²⁸⁵ *Loving v. United States*, 517 U.S. 748, 767, 772 (1996); *Swaim v. United States*, 165 U.S. 533, 557–58 (1897).

war of 1812 are in tension with Chief Justice Marshall's decision in *Brown*.²⁸⁶

To the extent that the courts and Congress accord broad statutory authorization to the President to conduct war, the question of whether the President's substantive power to decide on wartime tactics and strategies is based on the Commander in Chief Clause or derives from statutory authority may be of little practical significance. But as a theoretical and historical matter, it makes more sense to accord the President independent, but concurrent, power to conduct wars authorized by Congress.

One might also argue that the historical record supports several narrow exceptions to the broad concurrent power of Congress to regulate the conduct of war. First, Congress has not attempted to direct troop movements in battle, to provide battle plans, to order troops to attack or retreat, or to require an attack at a particular location. While Congress has instructed the President as to the geographic scope of his authority to attack the enemy and how many overall troops he may use, it has not told him particularly where he must attack or how many troops he must use in such an attack.

Congress has not done so because it has recognized that it would be impractical and unwise to manage such details as the army's battlefield movements and plans, not because it lacks constitutional power to do so. Congress certainly would never be capable of meeting and deciding when the army should retreat or advance, and the need for secrecy, unity of command, and flexibility in war generally preclude congressional legislation in this area. But there is no sound theoretical distinction between the powers Congress possesses and has exercised and the direction of and planning for battles. While Congress has not (and could not) command the army, it can and has placed numerous restrictions on how the army can engage in combat. Therefore, any purported narrow exception based on directing troop movement or providing battle plans is unwarranted.

Congress could authorize the use of force against another nation yet restrict that authorization to launching an attack against a particular town, and, indeed, in the Lebanon authorization it restricted the use of U.S. forces to Beirut. Congress could have used its funding power to restrict the use of authorized funds during World War II against any beachhead in France except those in northern France. Or it could use its funding power to limit the number of divisions for which funds could be used to implement the attack. None of these restrictions would be fundamentally or theoretically different from what Congress historically has done. While it would be impractical and

²⁸⁶ Bradley & Goldsmith, *supra* note 124, at 2093–94. For example, during the Civil War, Lincoln greatly expanded the President's powers and initiated a blockade and seizure of vessels without relying on congressional authorization, a position upheld by the Supreme Court. As one noted writer argues, "The Supreme Court in effect rejected much of what Marshall had written [in *Brown*]." HENKIN, *supra* note 247, at 104.

probably foolish for Congress to enact any of these types of restrictions,²⁸⁷ this does not mean that it would be unconstitutional for it to do so. Congress has many unchallenged powers to enact foolish or unwise measures.

One might argue, however, that the potential danger that Congress could enact impractical, and unduly restrictive legislation controlling the movement of troops in battle supports a constitutional rule that accords the President sole power in this area, even if the line that was drawn was somewhat vague or logically indefensible.

That argument fails for two reasons. First, such a line is unnecessary. Congress has never interfered with battle plans or troop movements in the course of battle, even during the Civil War when congressional intermeddling in military matters was at its height. There is no reason to believe that Congress is even remotely likely to do so in the future, or that it is even capable of doing so. The line drawing would not be in response to a real problem, but a speculative, highly remote hypothetical. Important constitutional distinctions ought not be based on imaginary problems.

Worse still, the purely speculative danger that Congress might in the future interfere with battle plans or troops movements in the course of warfare must be balanced against the very real and present danger that Presidents will use an exclusive power over troop movements to expand their power dramatically at Congress's expense.

Modern Presidents have done just that. They have sought to expand their narrow constitutional power to repel sudden attacks into a power to introduce U.S. troops into hostilities anywhere in the world where, in the President's opinion, the United States' national interests are threatened. They have argued that the President's narrow power to protect our troops precludes Congress from limiting offensive actions that significantly expand a war.

The current administration has gone further, arguing that the President's power to direct the movement of troops precludes Congress from absolutely forbidding torture, or warrantless spying against Americans. The potential for abuse of a narrow but theoretically expandable rule is enormous, ever-present, and demonstrated by history.

Congress has also generally not restricted the President's power to repel attacks on American troops.²⁸⁸ But the President's power to repel attacks

²⁸⁷ See Statement of Sen. Benjamin Wade, *supra* note 186 and accompanying text, p. 436.

²⁸⁸ See Cooper-Church Amendment, Lebanon authorization, Pub. L. No. 91-652, § 2(6) (1971); Somalia authorization, *supra* note 223 and accompanying text, and the Emergency Supplement Appropriations for the Fiscal Year ending September 30, 2007 providing funds for the wars in Iraq and Afghanistan, H.R. 1591, 110th Cong. § 1904(F) (2007), permitting the Secretary of Defense to deploy United States armed forces after the 180 day period of redeployment from Iraq for, *inter alia*, protecting American diplomatic facilities and American citizens, including members of the Armed Forces.

should be viewed as an independent power that permits the Executive to act with speed and flexibility in the absence of congressional authority, but that Congress has the right to regulate and limit that power.

The President's power is only the emergency power to *repel* an attack and is therefore by necessity a temporary one to be exercised until Congress meets to decide what to do.²⁸⁹ Indeed, the War Powers Resolution limited the President's emergency power to use troops to repel an attack to 60 days unless Congress is physically unable to meet or the President certifies that unavoidable military necessity respecting the safety of United States Armed Forces requires an extension for no more than 30 days.²⁹⁰ Thus, Congress has limited the time during which the President could utilize such "repel attack" authority, and could also impose advance temporal limitations in specific situations.

So too, Congress could also use its funding power and rules and regulation power to restrict the manner in which the President could respond. For example, legislation that provided that the President should not use nuclear weapons to respond to a Soviet attack on American forces in Europe during the Cold War would be within the clear power of Congress to make rules for the army despite its limitation on the President's power to repel attacks. Similarly, a hypothetical proviso that no funds provided to the Department of Defense could be used to attack China during the Korean War would be constitutional under Congress's spending power and declare war power even though it would have limited the President's authority to respond to a Chinese surprise attack on U.S. forces engaged in combat in Korea. Nevertheless, Congress might have concluded that the dangers of wider war in Asia were so enormous that the safer course would be to limit our response to a Chinese attack on U.S. forces. Indeed Congress has limited the permissible tactics that the President may use to respond to attacks on American troops by enacting rules and regulations for the military and statutes such as the War Crimes Act. More generally, as Senator Jacob Javits, an important sponsor of the War Powers Resolution, noted in the Senate debate on the Cooper-Church Amendment, the decision as to how to respond to attacks and protect American troops often requires a balancing of the lives of the soldiers on the front lines with the potential loss of many lives in an escalation of war—a determination that Javits felt was for Congress to make.²⁹¹

²⁸⁹ In this way, the President's power is similar in structure and intent to the power reserved to individual nations under the U.N. Charter to exercise their right of self-defense "until the Security Council has taken measures necessary to maintain international peace and security." U.N. CHARTER art. 51.

²⁹⁰ War Powers Resolution, 50 U.S.C. §§ 1541-48 (2000).

²⁹¹ See THE SENATE'S WAR POWERS, *supra* note 214, at 190-91.

Finally, as already discussed, Congress has not and could not constitutionally claim a right to appoint itself or someone else besides the President to command the armed forces and give it orders. While Congress has restricted who the President can appoint and has imposed rules as to the chain of command,²⁹² the sole means for Congress to remove the President as First General and Admiral of the Armed Forces is impeachment.

C. Concurrent Power Over Warfare: A Sequential, Non Horizontal View of Separation of Powers

The President's power as Commander in Chief to conduct war is best understood as a concurrent power shared with Congress but subordinate to congressional authority. The Commander in Chief's power to direct U.S. military forces in wartime is shared with Congress's panoply of war powers, and both institutions can take actions in the same subject area. As Congressmen Otis, Gallatin, and others argued in the 1790s,²⁹³ and Senator Trumbull and his Republican colleagues argued in 1862,²⁹⁴ the President could exercise his Commander in Chief power in the absence of congressional direction. Similarly, Chief Justice Marshall suggested in *Little v. Barreme*²⁹⁵ that the President might have independent power to seize ships traveling from enemy ports in wartime, but Congress could limit that power. Or as Justice Story argued in dissent in *Brown v. United States*, where there is "no act of the legislature defining the powers, objects or mode of warfare," the President has the power to act according to the law of nations. "If . . . such acts are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the [E]xecutive must have all the right[s] of modern warfare vested in him"²⁹⁶

The President has independent power stemming from his Article II Commander in Chief power to take actions he or she believes necessary in conducting hostilities authorized by Congress, so long as those actions are not inconsistent with constitutional restrictions and international law.²⁹⁷ The

²⁹² While the history of these restrictions is beyond the scope of this Article, see generally WORMUTH & FIRMAGE, *supra* note 65, at 87–104; Hartzman, *supra* note 65, at 182.

²⁹³ See *supra* pp. 427–29.

²⁹⁴ See *supra* p. 435.

²⁹⁵ 6 U.S. (2 Cranch) 170 (1804).

²⁹⁶ 12 U.S. (8 Cranch) 110, 149 (1814).

²⁹⁷ The President's independent constitutional power must be exercised consistently and not in derogation of the laws of war. Lobel, *supra* note 168. JORDAN PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 169–73, 487–90, 492–95, 856–61 (2d ed. 2003); Koh, *supra* note 7, at 1155–58. But see Robert Delahunty and John Yoo,

nature of warfare, which requires speed, secrecy, flexibility, and unity of action, dictates that the President have the power to act independently of Congress and not be required to await instructions or laws enacted by an unwieldy legislative body. Nonetheless, the functional need to provide a check on the Commander in Chief's wartime power requires that the President's power be independent, but not exclusive or primary. Congress, if it so chooses, can exercise its concurrent power to preclude or override presidential action to the contrary.

The grant of concurrent war powers to Congress and the President is not unusual in the United States. Although the Constitution explicitly grants Congress the power to establish rules and regulations for the army, it does not exclude the President from also exercising independent power to establish rules for the military. Presidents have often exercised such independent authority.²⁹⁸ As the Supreme Court said in *Loving v. United States*,²⁹⁹ Congress "exercises a power of precedence over, not exclusion of, Executive authority." The *Loving* Court noted that congressional plenary power to establish rules for the army co-exists with the President's independent duty as Commander in Chief "to take responsible and continuing action to superintend the military, including the courts-martial."³⁰⁰ Both Congress and the President thus have jurisdiction over the same subject matter.³⁰¹ That the President has independent power stemming from his Commander in Chief power means that he can act independently of congressional authorization, not in disregard of it.

Constitutional power to conduct warfare, according to this view of concurrent authority, is not divided between the branches based on a line between certain subjects amenable to congressional regulation and other

Executive Power v. International Law, 30 HARV. J. L. & PUB. POL'Y 73 (2000) for contrary view. In addition, the Bill of Rights precludes the President from taking certain actions, and he does not have broad Commander in Chief power to take certain actions in the domestic sphere. See *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 644 (1952).

²⁹⁸ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 27 (2d ed. 1920) ("[The President's] function as Commander-in-Chief authorizes him to issue . . . such orders and directions as are necessary and proper to ensure order and discipline in the army.").

²⁹⁹ 517 U.S. 748, 767 (1996) (citing *United States v. Eliason*, 41 U.S. (16 Pet.) 291, 301 (1842)).

³⁰⁰ 517 U.S. at 772. In *Swain v. United States*, the Supreme Court held that the President had independent Commander in Chief power to convene a court martial without statutory authority. The Court approvingly quoted a Senate report that the President possessed this power "in the absence of legislation expressly prohibitive." 165 U.S. 553, 557-58 (1897).

³⁰¹ See G. NORMAN LIEBER, *REMARKS ON ARMY REGULATIONS AND EXECUTIVE REGULATIONS IN GENERAL* 16 (1898) (Lieber also points out there is no clear line separating the President's constitutional authority in this area from that of Congress).

subjects in the exclusive province of the President. Rather, the practical division of power is sequential, not horizontal. This distribution of power is based on the practical reality of according the President initiative and flexibility to act quickly in the face of what often is a rapidly changing wartime political and military reality which the President is best equipped to respond to, yet also according Congress the power to check and limit presidential initiative both before and after the Executive acts. The President has the power to initiate, while Congress has a more deliberative reactive power as well as the power to condition and limit presidential power before engaging in hostilities.³⁰²

Alexander Hamilton and James Madison discussed this notion of concurrent power in their famous *Helvidius* and *Pacificus* debates.³⁰³ Hamilton wrote that although only Congress could decide whether the country could go to war, "the Executive in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions. From the division of the Executive Power there results, in reference to it, a *concurrent* authority, in the distributed cases."³⁰⁴

Madison did not disagree with Hamilton. The Executive could not impose "a *constitutional obligation* on the *legislative decisions*," but could create an antecedent state of things that would have "*an influence* on the *expediency* of this or that decision in the *opinion* of the legislature."³⁰⁵ To Madison, "[i]n this sense the power to establish an antecedent state of things is not contested."³⁰⁶ For both Madison and Hamilton, concurrent authority gave the President authority to act before the legislature did, but could not control or have primacy over legislative action.³⁰⁷

Ironically, the chief expositors of concurrent powers as sequential in the war powers area thus far have been proponents of Executive power. Adherents of strong presidential power have argued that the President and

³⁰² Michael J. Glennon, *The Constitutional Power of the United States Senate to Condition Its Consent to Treaties*, 67 CHI.-KENT L. REV. 533, 561 (1991). *Treaty Termination: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 311 (1979) (testimony of Professor Abram Chayes).

³⁰³ ALEXANDER HAMILTON, *PACIFICUS* NO. 1 (1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON (Harrold C. Syrett & Jacob E. Cooke eds., 1969); JAMES MADISON, *HELVIDIUS* NO. 3 (1793), reprinted in 15 THE PAPERS OF JAMES MADISON 102-03 (Thomas A. Mason et al. eds., 1984).

³⁰⁴ *PACIFICUS* NO. 1, *supra* note 303, at 42.

³⁰⁵ *HELVIDIUS* NO. 3, *supra* note 303, at 102-03.

³⁰⁶ *Id.* at 102.

³⁰⁷ For an interesting and illuminating discussion of this debate, see William R. Casto, *Helvidius and Pacificus Reconsidered*, 28 N. KY. LAW REV. 612, 630-35 (2001).

Congress have concurrent power to initiate hostilities.³⁰⁸ These advocates claim that the President may act pursuant to his authority as Commander in Chief to seize the initiative to wage war, subject to congressional control over funding.³⁰⁹

While these advocates of Executive power apparently understand the concept of concurrent power set forth here, they have misapplied it to the area of the initiation of warfare. The Constitutional design is clear. The President was not to have any power to initiate hostilities, but only the limited power to reply to surprise attacks. This contrasts sharply with the elaborate war powers Congress is given to control the conduct of war. The Framers made clear that Congress, and *not* the President, is the branch with the sole authority to initiate hostilities, but that once war was initiated by Congress, the President and Congress would have concurrent authority over its conduct.

As a practical matter, the President's command function derived from the Commander in Chief Clause means that he or she has the initiative to make what some scholars have termed "real time" wartime decisions as to the conduct of military campaigns and battlefield operations.³¹⁰ Congress cannot interfere with the command function by establishing a congressional committee or appointing someone besides the President to make such decisions. But Congress can, and has exercised its substantive war powers to, limit the options the President can entertain in deciding how to wage warfare, or to restrict, discontinue, or overturn Presidential wartime policies or decisions that it disagrees with.

IV. CONCLUSION

The Framers of the Constitution intended that Congress have substantial power to control the conduct of warfare it has authorized. The consistent history of congressional restrictions confirms that the Constitution grants Congress concurrent power to decide not only whether to initiate warfare, but how and in what manner those authorized wars should be fought. Accordingly, the Constitution sensibly accords the President considerable flexibility and discretion to prosecute a war, but permits Congress to

³⁰⁸ Yoo, *War and the Constitutional Text*, *supra* note 104, at 1683; Eugene Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 870-71 (1972).

³⁰⁹ *Dellums v. Bush*, 752 F. Supp. 1141, 1144-45 (D.D.C. 1990) (citing Justice Department memorandum in support of Motion to Dismiss). *See also Who Can Declare War?*, N.Y. TIMES, Dec. 15, 1990, Opinion, at 26 (quoting Justice Department's argument in court).

³¹⁰ *Debate* (Testimony of John Norton Moore), *supra* note 24, at 31; Raven-Hansen & Banks, *supra* note 45, at 914.

maintain the ultimate authority to decide whether the President's policies and strategies are those the nation should follow.

